IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAIME H. PIZARRO, ET AL.,
Plaintiffs,
v.
THE HOME DEPOT, INC. ET AL.,
Defendants.

CIVIL ACTION
FILE NO. 1:18-CV-01566-WMR

MOTION HEARING

BEFORE THE HONORABLE WILLIAM M. RAY, II

TRANSCRIPT OF PROCEEDINGS

MARCH 14, 2019

Proceedings recorded by mechanical stenography and computer-aided transcript produced by

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Thursday Morning Session

March 14, 2019

9:40 a.m.

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P R O C E E D I N G S

THE COURT: I've only got like a hundred names of lawyers, so I'm just trying to look at my list and see who's here and figure out who you represent. Ms. Adams, who do you represent?

MS. ADAMS: Sure, your Honor. Financial Engines Advisors.

THE COURT: What's the acronym? AF?

MS. ADAMS: FEA.

THE COURT: FEA.

MS. ADAMS: Or FE.

THE COURT: FE. Okay. And then Mr. Cochran?

MR. COCHRAN: Yes, sir. Good morning, your Honor.

THE COURT: You represent the same?

MR. COCHRAN: Yes, sir.

THE COURT: Okay. All right. And who represents -- I'm missing some people then, missing a lot of people. But who is representing the other movant on the motion? Okay. So you're over here. You're kind of confusing me because I'm thinking you ought to be over here. So who do you represent, sir? You're Mr. Knapp?

MR. KNAPP: Yes, your Honor. Alight Financial Advisors or AFA, Halsey Knapp, Krevolin & Horst. Ms. Karinshak could not be here because of legislature, and I have with me Ms. Amanda Amert, Head of Jenner & Block's national preeminent ERISA practice, and Mr. Craig Martin as well, chair of the firm.

THE COURT: Okay. All right. Then on behalf of the plaintiffs, Mr. Welch?

MR. WELCH: Yes, your Honor.

THE COURT: Mr. Field?

MR. FIELD: Yes, your Honor.

THE COURT: And Mr. Tracey. Okay.

MR. TRACEY: Yes, your Honor. Good morning.

THE COURT: All right. This is 18-CV-1566, Pizarro, I'm guessing, v. The Home Depot et al. Got a series of motions to dismiss with obviously some related issues in there so probably going to take them in the order that they were filed. Let me just check, double check that. Maybe they were all filed the same day. Let's see. They were. Okay. So given that they were all filed on the same day, it appears, I will hear Home Depot's -- that's how you're kind of aligned anyway -- Home Depot's motion first, which is obviously a little broader than the other two.

And I think the way we'll do it is I'll hear Home Depot's argument, hear the plaintiffs' argument, then come

back to Home Depot. I may or may not rule. If I can rule, then I'll decide, but then we'll move on to the other two motions. Okay.

MR. TETRICK: Good morning, your Honor. I'm David Tetrick from King & Spalding. And along with my colleague, Ben Watson, we represent the Home Depot defendants in this lawsuit.

The Home Depot defendants filed this motion to dismiss, your Honor, because the amended complaint doesn't state a claim that we breached our fiduciary duties or did anything else wrong with regard to the company's 401(k) plan, which we refer to as the FutureBuilder plan. The amended complaint says that we did two things wrong with regard to our plan.

Count I is a claim that we breached our fiduciary duty of prudence with regard to four of the funds that the plan offers as investment options. The complaint says that those four funds were imprudent because of poor performance during the class period alleged in the complaint.

Count II is an entirely different claim, and Count II says that we violated both our duty of prudence and the separate duty of loyalty with regard to our relationship with Financial Engines and Alight Financial Advisors. And as the complaint sets forth, Financial Engines is an optional investment advisory service that our plan participants could

opt into if they so chose.

Finally, Count VI is a derivative claim saying that certain of the Home Depot defendants may have delegated their duties to other people within Home Depot, and it is a derivative claim for failing to monitor those people.

For today's purposes, your Honor, I think you can assume that Count VI lives or dies with Count One and Count II because it is a derivative claim. So our argument this morning will focus on Count One and Count II. There are, of course, other counts in the complaint. Home Depot and the Home Depot defendants are not defendants in those particular counts, and so I will leave it to my co-defense counsel to argue about those claims.

With regard to the claims against Home Depot, the problem with the amended complaint, quite simply, is that it only shows that we could have chosen different funds than the challenged funds and that we could have chosen a different investment advisor than the ones we chose. That's not enough to state a claim or to survive a motion to dismiss under Supreme Court precedent because the Supreme Court requires that a complaint do more. It requires that it plausibly allege some misconduct with regard to those facts that are in the complaint so that the Court can draw a reasonable inference that in this case the Home Depot defendants are liable for that misconduct that has been alleged.

Turning first to Count I, Count I's fatal flaw is that it alleges just one type of evidence; that is, the alleged underperformance of the challenged funds. And it doesn't provide anything else that would allow the Court to take the step from that alleged underperformance to some act of imprudence on the part of the fiduciaries. And this is important because ERISA's duty of prudence doesn't judge results. It judges conduct.

So while the Court is required to accept plaintiffs' allegations about the underperformance of these funds and the relative better performance of the comparators, the mere existence of better performing funds doesn't tell us that there was anything wrong with the decision to choose those funds.

THE COURT: Yeah, but I thought the claim was -- I mean, they complain, I guess, about the original selection itself, but I thought they also basically allege that once it was clear that the underperformance was there, that you had a duty to change, and you didn't.

MR. TETRICK: They do allege something to that effect, your Honor.

THE COURT: I mean, I'm certainly paraphrasing the words, but, in any event, that's the way I distilled it, you know.

MR. TETRICK: And I think that that's a pretty clean

distillation. And the reason why we think that you should still dismiss Count I despite that allegation is that if you were to go to virtually any 401(k) plan in this country, you would be able to find that certain funds underperformed their benchmark, and you would absolutely be able to find that funds underperformed other funds that a plaintiff chose after the results were in. And that's the reason that we think that the allegations here are so baseless.

The plaintiffs have set up a complaint whereby they show you a table, and the table contains several comparators chosen after the results were in. And in two instances they then show the benchmark by which the fiduciaries actually monitoring those funds would have been reviewing the funds in realtime.

For the two that they show the actual benchmark or at least the one that you have to accept as the benchmark -- and those are the two small cap funds, the Stephens Fund and the TS&W Fund that they complain about. What you'll see when you look at the underperformance that they allege, is that in some years there was underperformance. In some years our funds did better than their benchmarks. It wasn't a sustained period of underperformance such that this Court could find that the -- that there was an air of neglect. And neglect is one of the things that Courts look to when plaintiffs like our plaintiffs here are trying to make a claim based on circumstantial

evidence. So in this case while the Court is required to accept as true the numbers that are in that chart, the Court is not required to accept the conclusion that the plaintiffs draw from those numbers.

The Court could find that it's equally plausible that the funds underperformed or outperformed on a given year or the Court could find it equally plausible in looking at those same numbers that while the numbers differ, the trend does not. That is, with regard to both of those funds, when one fund moved up, the other fund moved -- I'm sorry. When one fund moved up, its benchmark moved up with it. When that fund moved down, the benchmark moved down with it.

So there's not a case here, there's no fund that they have presented where you can look at the numbers they provided on a straight line and say significant underperformance for a ten-year period like some of the cases --

THE COURT: So what's the test? I mean, I understand the basic test, which is what they would have to show to prevail at trial. But what's the test for me to apply at the motion to dismiss phase to determine whether they have alleged enough? I mean, you're talking about me looking at the results and interpreting the results, but, you know, there's got to be some kind of test I would have to apply if I'm going to throw the case out without, you know, without there being an evidentiary dynamic to the case itself.

MR. TETRICK: That's right, your Honor, and I would not suggest and I don't mean to suggest that the Court engage in the type of number crunching that perhaps I've demonstrated here. My point is only that you're not required to accept their characterization of what those numbers show. But back to the Court's question, I think that the Court is onto something here because you're looking for a test rather than interpreting numbers.

I think that the *Pledger v. Reliance* case that is cited in our briefing and was decided by Judge Cohen in this district, I think that it provides a decent roadmap for what the Court should do. Now, the Eleventh Circuit hasn't provided any guidance for the Court with regard to these claims. Other circuits have, and Judge Cohen went through what those other circuits have done. And what Judge Cohen did in that case was he found that if a plaintiff is relying on underperformance of investment funds, that there must also be something in addition; that is, either a conflict of interest or there is something about an allegation of self-dealing.

So, for example, in the *Pledger v. Reliance* case one of the allegations was that the record keeper was self-interested. And the way the plaintiffs were able to demonstrate that is they were able to show that upon becoming the record keeper, the record keeper required the Plan to use the record keeper's proprietary funds, and it moved almost

$500 million out of funds that were well established and were well known in the marketplace and used that money as seed money for their own proprietary funds.

So there was a whiff of conflict of interest in the air there, and the record keeper had discretionary authority in that case, meaning that the person making the decision was also using money to seed their own funds. And Judge Cohen found that's enough, that's underperformance plus. There's some --

THE COURT: I'm sorry. Was that his case or that was just a case he was looking at?

MR. TETRICK: That was his case.

THE COURT: Well, that's an easy one. I mean, you see cases all the time with banks, you know, being charged with steering their customers when they're managing funds to buy their securities. So that doesn't mean that that's improper necessarily but it creates -- when it does poorly, then your on shifting sand I suppose, but what about -- I mean, it sounds like you're arguing that -- sounds like you're arguing that underperformance can never be enough. And I don't think -- well, you may not be arguing that, but that certainly could be the implication of what you're saying. You're not arguing that a fiduciary -- and there's no question Home Depot is a fiduciary; right?

MR. TETRICK: That's right.

THE COURT: I think Home Depot agrees to that, the Home Depot defendants. Then it certainly is possible that you could make a decision, and it turns out that that ends up in hindsight being a bad decision and that you could be responsible if you don't step in and do something; right? I mean, you're not arguing that; right? That there wouldn't be an abstract duty to step in if it was clear; right?

MR. TETRICK: That's right, your Honor. There's two ways really that the plaintiffs could overcome the shortcomings in this complaint. One is if they had alleged that Home Depot was engaged in some sort of self-dealing with regard to these funds. There's nothing in the complaint about that. The other way that they could have is they could have shown obvious and long-term underperformance.

THE COURT: Yeah, but that's where I want to concentrate. So at this stage then what is my test to judge whether or not the allegations sufficiently set forth obvious and self -- obvious -- it would have to be a reasonable standard that a reasonable fiduciary would have recognized that this is a problem that you've got to address; right?

MR. TETRICK: Right.

THE COURT: Okay. But I'm concerned about this is the motion to dismiss stage.

MR. TETRICK: And we understand, and what I can tell you is that the cases that the plaintiffs cite in support of,

in their briefing, in support of their having demonstrated long-term and obvious underperformance are a much longer track record than we have here. They involve cases where the underperformance went on for a decade or more.

THE COURT: What's the period that we're talking? Five years?

MR. TETRICK: Here it's -- the class period starts in 2012.

THE COURT: Through currently?

MR. TETRICK: It's to present, and for the most part what the plaintiffs allege in their complaint are results through 2017 because simply of the lag in some of the reporting.

And so when you look at the period that they've alleged, the actual 2012 through 2017, what you get is a mixed bag. You get years of overperformance, and you get years of underperformance. And that is not a demonstration of obvious and long-term underperformance. That's an indication that some of these funds did not outperform their benchmarks in some years and did perform their benchmarks in other years.

As we said in our briefing, in one instance two out of five years we outperformed or our fund outperformed its benchmark. And I'm not suggesting that there is any magic to the two out of five. What I am suggesting is that in a short sample period like a five-year period, underperformance in

three out of the five years is not obvious or long term, especially when the funds themselves are moving more or less with their benchmark each and every year.

THE COURT: All right. All these arguments are as to Count I; right?

MR. TETRICK: They are to Count I, your Honor, and I would encourage the Court to look at that *Pledger v. Reliance* case.

THE COURT: Do you happen to have the cite handy?

MR. TETRICK: I do, your Honor. It is 240 F.Supp.3d 1314, and it is a Northern District of Georgia case from 2017. I would also add, your Honor, that the *White v. Chevron* case that we cited in our briefing, which was a district court case, has since been affirmed by the Ninth Circuit, and I have that cite available as well if the Court would like it.

THE COURT: Yes, sir. I know I read that in your brief, but I haven't checked the case. What is your cite?

MR. TETRICK: The Ninth Circuit case cite is 2018 WL 5919670, and that was decided on November 13, 2018.

I would also direct the Court's attention to the Eighth Circuit's recent *Meiners v. Wells Fargo* case, which we did include in our briefing, and the reason that I would emphasize the *Meiners v. Wells Fargo* case out of the Eighth Circuit is that it confirmed this understanding that we're presenting this morning that allegations of underperformance

must be accompanied by something more to survive a motion to dismiss. And it did that by requiring the plaintiffs to offer meaningful benchmarks to demonstrate something more than underperformance. I think that the -- I'm sorry. And it did so secondly by affirming the district court's dismissal of allegations, quite similar to these allegations because the plaintiffs in that case had failed to show a meaningful benchmark with regard to the challenged funds.

I think that that case is particularly instructive here with regard to the plaintiffs' allegations concerning target date funds, and I would direct your Honor's allegations -- I'm sorry -- your Honor's attention to the allegations in the complaint concerning those target date funds because what's missing from the tables that the plaintiffs have presented concerning those target date funds is performance of those target date funds versus their actual benchmarks.

And there's a lot of tables in the complaint, and when the Court goes through them, it will notice that with regard to the first three challenged funds; that is, the Stephens Fund, the TS&W Fund, and the J.P. Morgan Stable Value Funds, at the very bottom of each of those tables the plaintiffs have presented you'll find a benchmark that they are comparing those funds to. They have their comparator funds chosen after the fact, but then they have benchmarks.

When you get to the target date funds, your Honor will notice that there is no benchmark. What they provide instead for each of the target date funds are three or four other target date funds that ended up doing better after the results were in. Those were the -- that was the same flaw, the failure to provide a meaningful benchmark that led the Eighth Circuit to affirm the district court's dismissal of the case against Wells Fargo that was all about target date funds.

So in that case with regard to the target date funds, that one is one where there is a clear test, albeit one that the Eleventh Circuit hasn't adopted yet, but that's a clear test for the Court to apply.

Judge, our bottom line on Count I is that the plaintiffs have no direct allegations of imprudence with regard to our monitoring of these challenged funds, and so they have taken the exceptional route of attempting to allege circumstantial evidence of what we would call underperformance plus. And there's no plus in this complaint. That's the test that we would encourage the Court to apply, and we would for those reasons ask the Court to dismiss Count I of the complaint with prejudice.

Unless your Honor has additional questions concerning Count I, I would move on to Count II.

THE COURT: Okay.

MR. TETRICK: Count II, as I said in my opening

remarks, is a completely different type of claim, and it alleges both loyalty and prudence claims against Home Depot. Count I of course only has prudence claims now, but Count II has both prudence and loyalty claims. These claims both concern our monitoring of Financial Engines and then later in the class period Alight Financial Advisors.

I'd like to take on the loyalty claim first because I think it's the easiest one to dispose of. The amended complaint has no allegations that we did anything with regard to Financial Engines or Alight for the purpose of benefiting The Home Depot or any other third party, and that's the test. In order to state a plausible claim for breach of the duty of loyalty, a plaintiff must show that the fiduciaries acted for the purpose of enriching themselves or a third party over the Plan participants. We accept everything that they say as true. What we have here is a situation where we hired Financial Engines, and they collected a fee.

THE COURT: So I understand the complaint, that plaintiffs don't like the fee structure. They don't like the way it was set up. Is there another allegation in this count? I mean, they're not also using -- well, I guess there was complaints about phone calls and wait times and live human interaction versus automatic computer generated AI type stuff. But is there anything else that supports this count?

MR. TETRICK: With regard to the duty of loyalty

claim as against Home Depot, there is nothing else that pertains to Home Depot's loyalty.

THE COURT: Okay. But even as to the prudence part, do they bootstrap the claims from Count I into this count as well?

MR. TETRICK: No, they don't, your Honor. They're completely separate allegations, and what they say is that by hiring Financial Engines and allowing it to engage in the misconduct that they allege.

THE COURT: Which was what?

MR. TETRICK: What they refer to --

THE COURT: Which is what the contract provided the billing structure to be and then, you know, maybe a claim related to if they knew that people were waiting so long and couldn't actually reach live people. But, I mean, was anything that was -- maybe the wait times is something a little bit different. But there's nothing else my guess -- my understanding is that it was a surprise. I mean, otherwise it was all provided for in the contract.

MR. TETRICK: That's right, your Honor, and I would direct the Court's attention to the plaintiffs' response to Alight's motion to dismiss where the plaintiffs characterize this as a case where Alight breached its contract with Home Depot by not providing the services.

So these are all about the claims that are in the

complaint about the phone calls that were not returned and things along those lines, but there's not a single allegation in the complaint that any harm resulted from the things that they complain about. And that goes to the prudence claim.

The loyalty claim, if I can just finish up with that very quickly, your Honor, I would say that the plaintiffs' response to our Home Depot brief on page 23 effectively concedes that they don't have a loyalty claim. In response to our arguments that the Court should dismiss their loyalty claim, the plaintiffs provided three sentences on page 23. And what they say is that a loyalty claim here exists because our decision to hire Financial Engines permitted Financial Engines to collect fees for providing services. That, of course, is true for every service provider that we hire, and it doesn't show disloyalty to do so. So at a minimum the Court should dismiss the loyalty prong of Count II.

Turning then to the prudence prong of Count II, the analysis that we think applies here is very similar to the analysis that applies to the prudence claim with respect to Count I; that is, what we have here is an optional investment advisory service. We didn't force anyone to use Financial Engines. We thought that it was a benefit to the participants who did, obviously, or we would not have hired them in the first place, but we didn't force anyone to use them.

They were participants that wanted to use Financial

Engines, could opt in. There's no allegation that there was a problem with the disclosure of the fee that was charged here. There's no allegation that we hid anything about Financial Engines, and as a result of that, what we've got is something that is more akin to an investment option that a participant could have opted into, as opposed to some of the cases the plaintiffs cite in their response having to do with record keeper fees.

And the difference is apparent. It's the difference between something that you have to pay, like a recordkeeping fee, and something that you choose to pay. And the difference is important here with regard to Home Depot in particular because what we're accused of is failing to monitor. And that, of course, is a fiduciary duty, and it's not one that I mean to diminish. But it is a secondary duty. It presupposes that you've got someone else doing a job, and as a fiduciary your job is to monitor what they are doing.

So when you've got an optional investment advisory service and you don't have anything that looks like a red flag, such as the participants who opted in are actually getting performance results that are worse than those who chose not to opt in, if you had something like that, if you had complaints that were bubbling up, if you had allegations showing the fiduciaries knew that this was a bad product and neglected to do anything about it, then that would state a

claim for imprudence.

Here we don't have that. What we've got is that we failed to adequately monitor an incumbent service provider by doing a couple of things specifically. One is we failed to seek competitive bids for other investment advisory services. That allegation can be found in paragraph 179 of the amended complaint.

The other allegation that they have is that we failed to poll participants in our plan.

THE COURT: Failed to what?

MR. TETRICK: "Poll" is the word they used. I think they mean survey, to survey --

THE COURT: To see how they it?

MR. TETRICK: To see if they like it. Exactly. They say we didn't do that, we should have. And that's in paragraph 65 of the amended complaint. But there is nothing here that says that these services were mandatory or that the fees weren't disclosed. There's no concrete allegations like many of the cases cited by the plaintiffs that show, for example, that we could have leveraged our size to get a lower fee from Financial Engines. They make one allegation in the complaint that on information and belief Financial Engines offered lower fees to other unidentified 401(k) plans, and I think the Court is required to accept that as true for the purposes of a motion to dismiss, but it only goes so far.

Even if that fact is true, it doesn't show how we failed in our duty of prudence by not getting a lower fee. It's equally plausible that the results of our negotiations with Financial Engines resulted in the best arm's length deal that we could get given the specifics of our Plan. And we don't know anything about these other plans because the plaintiffs didn't allege anything about those other plans.

So that allegation doesn't move the needle.

THE COURT: Okay. So I don't understand that argument. I mean, I don't understand how much you would say that they've got to allege by another plan. They basically have said -- and I'm talking your words. I'm not -- I don't independently remember that allegation in the complaint, but that there was a similarly situated 401(k) plan. Maybe I'm adding the word similarly, but I would think that it's probably alleged something like that, and they didn't negotiate a better deal than you negotiated.

So you're saying, well, they're not showing that we didn't get the best deal that we could get under the circumstances. That sounds like what discovery is for. I mean, your contention would be that we did get the best deal we could get. I mean, if the case goes forward, theirs would be that you didn't, and obviously they would have the burden on that.

But what more would they need to say about this other

plan? I mean, like give all the terms of its contract versus the contract that you negotiated? I'm not sure that they even have access -- they would have access to what the consumers have access of, but I'm not sure that they would have access to all the other things that you would have access to relative to your negotiation until discovery was commenced.

MR. TETRICK: Your Honor, they certainly would have access to information about those other plans that would be enough for them to beef up the complaint here enough to survive a motion to dismiss.

THE COURT: You mean like what their fee structure was --

MR. TETRICK: They would -- and I'm sorry to interrupt.

THE COURT: Is that what you mean? Because, I mean, that would be obvious that they probably would have access to that if they knew about it at all, but as far as the negotiation give and takes, I mean, no third party is going to give them that unless they happen to have had it in another case, I guess.

MR. TETRICK: Your Honor, the information about other comparator plans is publicly available through an annual report that qualified plans like ours are required to file.

THE COURT: But we're talking about the fee, like, okay, that's how they know that there was a better deal out

there that somebody else got; right?

MR. TETRICK: Which -- well, I don't know how they know that there's a better deal because they only say upon information and belief. That's all the information they provide. But even accepting that as true, that someone got a better deal, that doesn't show imprudence on our part. If they had, for example, shown the Court that there was another plan in the same industry of the same size with the same amount of assets with a similar number of participants so that you could back into the average account balance --

THE COURT: How would they find out how many participants another plan has without discovery?

MR. TETRICK: They would go to the Department of Labor's website, and they would search by name or by plan number or any other number of identifiers, and they can pull up all of the information that I have just provided through publicly available means on their iPad. That's how they could find it.

So the weakness of the upon-information-and-belief allegation really stands out in a case where information about other plans during the class period is publicly available. They don't need discovery in order to go and make concrete allegations about these other plans that supposedly are similar to us even if those plans were able to get better deals than we did.

THE COURT: So let me ask you this then: I understand your point, but if they had alleged that there is a plan of comparable size, value, number of investments, all that information that might be available, and it shows that a much better fee structure was negotiated for the plan participants than Home Depot negotiated for its plan, would that be the type of evidence then that you would concede would survive a motion to dismiss if they had done that?

MR. TETRICK: I think if they had provided specific information about a plan that was actually a comparator and they had shown a significant enough difference between the fee structure that we negotiated and the fee structure that the other plan negotiated, then the Court would have to look really hard at that and would have to say is that enough for me as a judge to give them the benefit of the doubt and say, yeah, there's an air of neglect there or incompetence or something.

But the fact that the other Courts in this area have required something akin to neglect or incompetence means that it would have to be something that would really get the Court's attention. It's not something where the Court looks at it and says, well, yeah, that's kind of close. It would have to be something that was different enough where your Honor could look at it and say something else is going on.

THE COURT: So the allegation in the complaint

relative to this better hypothetical plan gives no specifics about how better?

MR. TETRICK: None.

THE COURT: Just that it was better.

MR. TETRICK: Upon information and belief other similar 401(k) plans got a better deal. That's it. It's about as bare bones as could be. And so we don't make much of that, and, you know, we also would point the Court's attention to some of the cases that were cited in our briefing, including the *Hecker v. Deere* case out of the Seventh Circuit that says that when it comes to service providers and investments, that fiduciaries are required to look at more than simply price, that we're not required to get the best possible deal out of it.

THE COURT: Right. But that's certainly getting into the weeds of motion for summary judgment, not motion to dismiss; right? If you're asking a judge who's a lawyer -- you know, I've got a little bit of financial understanding, but I don't invest in individual stocks intentionally because I realize that it's better for me to be in mutual funds, to diversify and not have the risk. So certainly at this stage, just on the whatever knowledge I might have, you're not asking that I try to evaluate that kind of stuff. You're just saying -- it seems like your best argument is they didn't tell us anything. So if they didn't tell us anything, then there's

really no allegation at all. It's just a conclusion is what you're saying.

MR. TETRICK: That's exactly what I'm saying, and I'm saying that the *Hecker v. Deere* case shows that other judges have taken allegations that somebody got a better deal and have dismissed those allegations. That's all.

They also allege, of course, that we failed to seek competitive bids and --

THE COURT: Does that matter? I mean, ultimately it comes down to the deal that you got and whether or not that was a prudent decision to take that; right?

MR. TETRICK: That's exactly right, Judge. There's no requirement in ERISA or in the case law interpreting it that you put things out for competitive bids.

And, finally, we would say with regard to Count II, that the allegations concerning the change in 2017 that occurred, that is, up until 2017 Financial Engines provided the investment advisory services, beginning on July 1 of 2017 Alight Financial Advisors stepped into that role, and it subcontracted with Financial Engines for the period thereafter to provide those investment advisory services.

Those allegations with regard to Home Depot, they don't move the needle on Count II, and the plaintiffs specifically allege that we allowed that to happen; that is, the changeover from Financial Engines being a direct service

provider to being an indirect service provider. They say we allowed that to happen, and therefore we allowed a bad deal to continue, and we don't believe that that changes the outcome. That is, Count II still needs to be dismissed because there's no allegations whatsoever that that change in relationships had any impact on the fees that were charged to the participants using the service.

So the point here for us on Count II is that the loyalty claim needs to be dismissed at a minimum, and the prudence claim just doesn't show enough to survive a motion to dismiss. And for these reasons we would ask that the Court dismiss Count II.

And, finally, what we would say is that there's nothing in this amended complaint that shows that Home Depot's process was so flawed or that it acted so disloyally that it would merit Home Depot expending the significant time, energy and money required to defend itself against claims that could be filed against any 401(k) plan in the country that contains mutual funds that occasionally underperform the benchmarks and which offer Financial Engines as an optional investment advisory service.

I'd remind the Court that the plaintiffs have already amended the complaint once in response to our initial motions to dismiss, and so we would ask that the Court dismiss Counts I, II, and VI and do so with prejudice.

THE COURT: All right. Thank you, sir.

MR. TETRICK: Thank you.

THE COURT: Who is going to -- Mr. Welch, you're going to argue?

MR. WELCH: Mr. Field will argue, your Honor.

THE COURT: All right. Thank you. Give me just a second, if you would. All right, Mr. Field.

MR. FIELD: Thank you, your Honor, and good morning.

THE COURT: Good morning.

MR. FIELD: The plaintiffs here have pled sufficient facts from which this Court can infer that Home Depot breached its fiduciary duty under ERISA. Our claim goes to two positions. One, that Home Depot failed to monitor the investments in the plan and remove imprudent investments. Plaintiffs also allege that Home Depot failed to monitor Financial Engines and Alight and stood by while these entities overcharged plan participants for substandard services.

The first claim goes to the investments and the standard there -- and you asked for a standard. The standard was set by the United States Supreme Court in *Tibble v. Edison* which says that Home Depot has a duty to monitor its investments and remove imprudent investments. It doesn't say remove imprudence if certain other facts are present. It just says remove imprudent investments.

And what we're going to do is demonstrate why these

investments were imprudent, and we're going to show and we showed in our pleadings that the underperformance of these funds spanned ten years, both before and during the class period. And we're not talking about 2 or 3 or 4 funds. We're talking about 11 funds out of 20 fund options that these participants had.

And we don't need to look any farther than Home Depot's own performance disclosure, which they gave plan participants, and that disclosure shows that these funds underperformed their benchmark for one, five, and ten years. We can start with the TSW Small Cap Value Fund, and their own disclosure shows that for one year, five year, and ten years that fund underperformed the Russell 2000 Value Index, the benchmark that Home Depot had identified for this fund. And it shows that for a ten-year period the underperformance was 80 basis points or eight-tenths of one percent.

That may not sound like a lot, but over a ten-year period that amounts to eight percent. For someone who had a hundred thousand dollar account, that's $8,000 for a plan participant. For a fund of this size that was $200 million, that was a $15 million difference in performance versus the benchmark. This is not mild cumulative underperformance. This is real underperformance of a significant amount.

Now, Home Depot, they complained about our charts, and it is true that Home Depot did not underperform every

single year. And we'll take a look at the TSW. You look at our complaint, and we show you the performance over ten years. And over a ten-year period that fund underperformed seven out of the ten years.

In the four years leading up or the five years leading up --

THE COURT: So let's talk about that. So taking your allegation at face value, underperformed for ten years. So at what point in that ten years does that trigger Home Depot's obligation to make a change? You're looking at it at the end of ten years.

MR. FIELD: I think, if I might, an expert is probably better qualified to say that, but in my view that after four or five years if somebody is continuing to underperform the benchmark, it's time to be removing that investment.

THE COURT: You remove an investment because of a five-year trend?

MR. FIELD: Yes.

THE COURT: So you've got an expert that will say that, that for any stock or fund, you look at five years, and if it's underperformed versus its benchmark, then it's time for it to go?

MR. FIELD: Yes.

THE COURT: Okay. Well, I mean, there's also the

corollary, which is when you sell things when they're low, then you're going to lose too. So I'll take you for your word that you've got an expert that will say that, but I don't know. I mean, certainly not a one year. I mean, you're not saying fund underperforms for one year, that triggers an obligation to dump it; right?

MR. FIELD: I'm not and --

THE COURT: I mean if it underperforms by like 80 percent, okay, but, I mean, that's not what we're talking about.

MR. FIELD: I think what you would find most professionals who do this for a living, what they will do is that they'll engage in investment advisor to manage their assets, and I'm talking about institutional type investors, not you or me. And so they will turn their money over to an advisor, and if the advisor in the first year underperforms the benchmark, there's probably going to be a meeting. Why did you do this? What happened? Tell me about the performance attribution. Explain this to me. Why is this? I'm paying you to beat the benchmark not to give me underperformance.

Second year if that happens again, the investment advisor is likely going to get put on what's called a watch, and so now beware that if you don't do any better, you're likely going to be terminated.

In the third year if that happens again and the investment advisor is still underperforming its benchmark for a three-year period, it's very, very likely that that investment advisor will be terminated.

And at five years, depending on the level of the underperformance, it's almost a certainty that's going to happen.

THE COURT: But I thought at least for two of the five funds that we were talking about -- maybe it was more than that. But I thought for some of the funds we were talking about, that in a couple of those years they actually overperformed rather than underperformed, and so we're not talking about, at least as to those particular ones, we're not talking about five straight years of underperformance; right?

MR. FIELD: We are about the TS&W Fund. If you look at that between 2008 and, I think, 2012, if you look at that five-year period, it was under its benchmark by about eight percent.

THE COURT: Every year?

MR. FIELD: No, not every year, and you can't expect it to underperform every year.

THE COURT: Well, but your hypo basically said that one year if you underperform, that you're going to -- we're going to have a meeting. And then second year you over perform, we're going to probably put you on some kind of

double secret probation, you know, maybe not so secret. Third year, then it's even more serious. You may be terminated. But if in one of those years it actually overperforms, how does that change the dynamics of your review?

MR. FIELD: It changes the dynamics based on the amount of overperformance. So if I underperform the first year by five percent and I outperform the next year by three percent, I'm still under the benchmark by two percent. You have to look at it over a period of time cumulatively much like you would a baseball game or a football game that's measured in innings or quarters.

So you're not looking -- they're not going to underperform every year because the law of averages are going to say there's going to be one year where you're going to do better or two years. So that's why you have to look --

THE COURT: I know, but you're suing the defendants saying they should make a change. And I'll try to put things in analogies that I can understand. If my football coach has a losing record -- I'm under Georgia. Kirby Smart had a pretty bad losing record his first year. It was horrible. But the second year was pretty dadgum good. We didn't win a national championship, but it was pretty good. So he's not on probation with me even though he didn't win a national championship that second year.

Last year was a really good year too. It wasn't as

good as the year before, but it was good. That first year, though, was really bad. I mean, we lost to teams that we hadn't lost to in a long time. We lost three home games, I think. But I guarantee you I don't feel real bad about that first year after that second year and that third year. And then so if we turn out to lose next year and we lose a couple of games that we shouldn't win, you know, I'm not sure where I'm going to be, but I doubt I'm going to be at the firing stage.

And finance is different I understand, but we're looking at Home Depot's decision year to year. So if we have a year next year that's disappointing and we lose a championship game or we lose a game in the middle of the season, then, you know, I'm going to have a feeling, but I doubt I'm going to be at the firing stage.

So I understand your point. I'm really less concerned with the overall picture at summary judgment that we would be talking about. And then, of course, if we're there, then we've got expert witnesses who are aiding me from a financial basis, but, you know, I'm concerned about the allegations as they are. So I know I'm sort of just rambling, but, in any event, do with it what you can.

MR. FIELD: Well, there are cases that support our view. There are a number of cases, one here in the Northern District, which was *Henderson v. Emory University*, which said

that if you can show underperformance over a one, five, and ten-year period, that's sufficient to survive a motion to dismiss. *Castle v. Vanderbilt University* in Tennessee was the same thing. And there are a number of these university cases that go on and on that say five years of historical underperformance is sufficient, one, five, and ten years. And there are just a number of them, *Cunningham v. Cornell* in New York, *Nicholas v. Princeton* in New Jersey. And it just goes on and on, and all of these cases have said that at a motion to dismiss stage years of underperformance is sufficient to survive a motion to dismiss.

There was a case in Colorado, *Trout v. Oracle*; in New York, *Jacobs v. Verizon*, that essentially said the same thing, that when you have funds that are underperforming over an extended period of time, that that's sufficient and that whether or not it is sufficient enough to win a case, that's something for summary judgment, like you just mentioned, your Honor.

THE COURT: Well, so what about the allegations that -- the arguments that Mr. Tetrick made relative to the target funds that you said you didn't include benchmarks, you know, alleged that they've underperformed. Like you did with some of the individual funds, you didn't do it with regard to these generic -- I guess these are retirement dated type things, 2020 and 2030. Like what's your horizon at

retirement? If I'm wrong, then tell me. But he says you didn't give benchmarks in those situations.

MR. FIELD: The benchmarks that we did use we used the ones that they had in their --

THE COURT: Did they have, Home Depot --

MR. FIELD: In their disclosure to their participants they showed the performance versus the benchmark, which was the Dow Jones -- the Dow Jones Global Target 2030 or Target Date Index Fund. For us we could not find that index, and we couldn't access it. We looked, and we couldn't find something that was called the Dow Jones Global Target Index. So we used what we felt was the closest to an index, and that was Vanguard. But we didn't have access to it. We couldn't access it, couldn't find it.

And so if you look, though, at their own disclosure, they'll show you that -- and we put this in our brief that -- in our complaint that based on their disclosure, not a single one of these target date funds outperformed their benchmark for ten years or since inception. Six of the eight failed to underperform for five years, and five of eight failed to perform for one year.

So their own disclosure --

THE COURT: Five of eight failed to what?

MR. FIELD: Their benchmark, they failed to beat their benchmark.

THE COURT: Okay.
MR. FIELD: Is what their own disclosure says.
THE COURT: One year?
MR. FIELD: One-year, five-year, and ten-year.
THE COURT: Wait a minute. But did you just say that one of the funds failed to beat its benchmark one year?
MR. FIELD: Five of the eight failed to beat for one year.
THE COURT: One year. I'm sorry. Go ahead.
MR. FIELD: No, please.
THE COURT: Would you have any of those funds that you're complaining about that beat its benchmark as you allege more than half the time?
MR. FIELD: No.
THE COURT: Okay. All of them was less than 50 percent?
MR. FIELD: Yes, if you look.
THE COURT: And what kind of percentages are we talking about?
MR. FIELD: Well, for example, for the ten-year performance not a single one of these funds beat its benchmark.
THE COURT: Okay. That's a hundred percent. I don't mean like that. I mean percentage under the benchmark.
MR. FIELD: You mean the actual --

THE COURT: Yeah, like the benchmark was at a hundred and it was at ninety.

MR. FIELD: All right. I understand. Sorry. So, for example, we looked at the 2040, and for ten years that underperformed its benchmark on an annualized basis by about 1.3 percent. Cumulatively that's 13 percent over a ten-year period. That's pretty significant.

THE COURT: All right. Go ahead, sir.

MR. FIELD: So we answered that with the TSW fund, and then we turn to the Stephens Small Cap Fund, and it again shows pretty significant underperformance. The ten-year underperformance was about four percent versus seven and three quarters percent, so that's three and three quarters percent difference over a ten-year period. That's thirty some percent. That's a big number. That is significant underperformance. That's not mild cumulative underperformance.

For this fund, which was a small $50 million fund, that amounts to about $10 million in lost retirement savings for these participants.

We talked about the target date fund. Again, we used their own numbers, your Honor, to show that over a one, five, and ten-year period these eight target date funds were vastly underperforming their benchmark.

And we also used comparator funds. Now, these

comparator funds that we used, we didn't identify them as comparators. These were funds that Morningstar identifies as comparators to these Home Depot funds, and Morningstar is the leading organization in this country on funds, fund performance, fund rankings, and fund ratings. So we took their ratings and their analysis and used it, so these are not comparator funds that we just pulled out of thin air. So we compared those with what Morningstar had, their rankings, their ratings, and showed that some of these, for example, the target date funds were in the bottom quartile of all target date funds. They just weren't that good.

And so at the end of the day what we've shown here by this underperformance is that these participants lost money and --

THE COURT: Would you mind if we jumped ahead, not on the issues that we're talking about but maybe at the stage of the litigation. So let's assume we're at the summary judgment stage. What is it that I would have to find at the summary judgment stage to decide that there is a triable issue as to whether or not Home Depot defendants failed in their duty, duty of prudence with regard to monitoring the funds, deciding whether to get rid of them or not? What is it that I would have to find to decide that? You've quoted me some evidence but I'm -- before I had my last job I was a trial judge a long time, and I'm always interested in what those tests are. So I

would have to find what?

MR. FIELD: That test you would need to satisfy is that Home Depot had a prudent process. Losing money --

THE COURT: I'm sorry. Had what?

MR. FIELD: A prudent process. Losing money is the result. And so why did they lose money? And we believe that it was because they had a process in place that was not vigorous, and the only way we can find that out is to see what went on in these committee meetings and what kind of a process did they follow when they selected these funds. What were they looking at? How were they comparing these funds to the benchmark? How were they comparing these funds to comparable funds? What were the comparable funds? Is there anything else we could have been doing as a fiduciary to be exercising due care and loyalty?

THE COURT: So apart from the results, if they have an expert that testifies, well, you know they really considered all the things that they should consider. At the end of the day the results were less than what the market allowed on an average these benchmarks. And you don't have an expert that says -- again, I know that's a pretty big hypothetical, but you don't have an expert that really can meaningfully criticize the process but can criticize the results. Results speak for themselves as to what they are. Then where does that leave you?

MR. FIELD: That leaves me in a bad spot because if I can't show that the process was defective or deficient, it's not about results. It's not about whether they lost money or made money. That's the result that happened from a process that we claim was tainted by a failure of competency and effort, and that's what we need to be able to prove.

THE COURT: Okay.

MR. FIELD: Does that answer?

THE COURT: Yes, sir.

MR. FIELD: All we're saying is that the evidence that we have raises a pretty strong inference that what was going on here was not, was not vigorous, and that's what we're saying.

THE COURT: And, of course, you're getting to that conclusion because the results are what they are.

MR. FIELD: That's right, because we don't have access to any of the other information.

Are there any other questions you have for me on this?

THE COURT: On Count I? That's what we've really been talking about is Count I. No.

MR. FIELD: All right. So now I'll move on to the other count and this is --

THE COURT: Can't we dispense with the loyalty part of this --

MR. FIELD: Yes.

THE COURT: Easily? That that's not really a claim that you've got?

MR. FIELD: The only claim that -- the only loyalty that we saw there is that they didn't go out and seek competitive pricing, and our thinking --

THE COURT: What does that have to do with loyalty, though?

MR. FIELD: Well, here's what our thinking was. Our thinking is that a loyal person, if you're loyal to somebody, then you will go out and do your best. Just like you and I would if we're shopping for a car or insurance, we're going to go out and price shop. Now, whether that's prudence or loyalty, I guess it remains to be seen, but if your Honor would like to dispense of --

THE COURT: Well, what's the difference in -- if it's -- you would clearly agree that it's prudence; right?

MR. FIELD: Yes.

THE COURT: So if it's the same as loyalty, then what's the difference?

MR. FIELD: You're right.

THE COURT: So it's got to be a difference or we wouldn't have two different things here. So it sounds like what you're really complaining about is the decision they made, not that they were dishonest or self-dealing or trying

to prefer someone. I mean, you don't have any allegations in your complaint that it was some kind of relationship with Financial Engines or AFA that caused them to steer -- make decisions and steer stuff the way they did or these funds that were included.

MR. FIELD: We can dispense with that.

THE COURT: All right.

MR. FIELD: So now we're looking at Home Depot's selection of Financial Engines and Alight, and just like with any other fiduciary and just like with these funds that Home Depot selected, they have a duty to prudently select them and then monitor them and evaluate them over time.

THE COURT: You've complained about the original set up, but I'm assuming you concede that the original decision is barred by the statute of limitations.

MR. FIELD: I see that.

THE COURT: Okay. So then your real complaint is that they didn't change it at some point?

MR. FIELD: It does because the cases that we have found have essentially said that the fiduciary has a duty to periodically look at price and compare price, and we looked at these university cases again. There was *Henderson* here in the Northern District. We've got *Tracey v. MIT*, *Short v. Brown*. This was an issue that was all over the country, and the Courts in all of these cases said that, yes, a failure to

solicit competitive bids on a periodic basis, although is not a requirement, it could raise a plausible issue that there was imprudence here and we're going to take a look at it further. And what was --

THE COURT: But only if the competitive bid you could prove would have yielded better results; right? I mean, the fact that the process of negotiation versus competitive bid was chosen doesn't matter if the evidence would be that they got the best deal that they could get under the circumstances for their employees.

MR. FIELD: Well, that's not what they said at a motion to dismiss stage. That may be further on down, but at a motion to dismiss each one of these cases said that a failure to get a competitive bid raises an issue.

THE COURT: What issue does it raise?

MR. FIELD: Whether they were exercising --

THE COURT: But you have to then assume that the competitive bid would have yielded a better price, and that's not always true, particularly when price isn't the only factor, you know. So I'm not sure how any judge anywhere could automatically know that a competitive bid was going to be better. I mean, it makes intuitive sense that it could be, but it might not be. And you don't know; right? You just know that they didn't have competitive bids.

MR. FIELD: Well, we also know -- and we alleged this

in our complaint -- that there was a vast number of competitors out there that were giving much better pricing.

THE COURT: Do you know whether they gave that through negotiation or competitive bidding?

MR. FIELD: I don't.

THE COURT: So that's my point, that it doesn't sound like -- it seems like the -- competitive bidding to me sounds like a red herring. You have an appellate court that has said that that in and of itself would show imprudence?

MR. FIELD: No.

THE COURT: Yeah, I mean, that sounds like results oriented justice to me. The end result is did they get the best deal that they could get under the circumstances or even arguably so, you know.

MR. FIELD: I think what these courts have been saying -- and they're not appellate courts, but they've been saying that one would expect a fiduciary to do this kind of a thing, especially for something as important as investment advice that was running fees into the millions of dollars every year. Somebody should have been looking at this. This is not some small minor issue that -- service that was being performed here. This was a fiduciary service, and there were lots of money at stake. And so somebody should have been out there at least looking at what competitors were charging for a similar service, and that's our issue.

THE COURT: What about the defendants' claim that you didn't give enough specifics about what these -- the whole information and belief argument that there was this better plan out there, this comparable plan that had better rates? You know, he says you could have gotten all that information and put it in your complaint. One, could you have? And, two, did you need to?

MR. FIELD: I don't think we needed to, and at the time we could not. We were -- it was explained to us that they would prefer that that not be put in the complaint.

THE COURT: Who? Who prefers --

MR. FIELD: The person that gave us the information.

THE COURT: So you didn't get it from a website like he was suggesting you could?

MR. FIELD: No.

THE COURT: Could you have gotten it from a website?

MR. FIELD: From the 5500s? The DOL website that he's talking -- yeah, he's talking about --

THE COURT: I don't think he named it -- yeah, Department of Labor, he did say that, yeah.

MR. FIELD: There was a form called a 5500. It's a pretty massive document, and if we wanted to spend hours and hours scouring these forms, yes, we probably could have dug that up.

THE COURT: Okay.

MR. FIELD: And so what we did is that we identified rather than doing -- we identified competitors that Financial Engines had said were competitors, and we looked at what their fees were. And those fees you can find on a website. You can find them in other places, and we found that the fees for similar type services where they were selecting among mutual fund allocation programs ran from 7 basis points to the most expensive was 30 basis points. And Financial Engines was 50, 50 basis points which --

THE COURT: That's half a percent? Is that half a percent? Is that what we're talking about?

MR. FIELD: Yes. Now, that may not sound like a lot, but if you span that over 10 years, 20 years, it begins to get -- becomes real money. And we showed an example in our complaint that over a period of 35 years one percent, a one percent difference in expenses amounts to a 28 percent difference in what you have in terms of savings at the end of that 35 years.

It sounds like very small, but over time that amount of money, when it's compounded every single year, it adds up to real significant money. And they have a duty to make sure that they're defraying expenses. Home Depot has that duty, and they breached that duty by not doing these things. They did not defray the expenses, as we think that a loyal and prudent fiduciary would.

THE COURT: So we're talking about Count II. So that part of Count II as it relates to damages I understand, but what about this complaint or the allegations that relate to bad phone call etiquette, you know, voicemail hell, and all that kind of stuff? I mean, how do you show damages for that to the individual members that you sue for? Frustration, yeah, I understand that but as far as damages.

MR. FIELD: Well, what it is, it's the overall service that they were to be getting from Financial Engines. So I'm going to back --

THE COURT: But that doesn't matter if the results -- if all the evidence is that they paid a reasonable fee, under all things considered, and got a reasonable return, all things considered, benchmark comparisons, all those things, the fact that they dealt with computers and not people, the fact that they were on hold or had a hard time getting phone calls returned, that really doesn't matter, does it? It matters in frustration for the employees, but, I mean, it's not articulable as far as damages are concerned, is it?

MR. FIELD: It is. Not what you just mentioned, but when you look at it as a whole, the whole package.

THE COURT: Let's say that's all there is. Let's say your allegations are that they didn't use prudence because they hired financial companies that provided bad customer service. That's the way they want to characterize it. I know

that's not the way you want to characterize it, but otherwise got good results financially. I mean, there's no complaint; right? I mean, bad boss maybe but not for money. You couldn't sue for that. You couldn't withstand a motion for summary judgment on something like that.

MR. FIELD: Well, they have fees that they've been collecting.

THE COURT: So because if they got a fee and they didn't get their phone call returned promptly but they got good results, maybe even superior results, that would -- they'd be entitled to some kind of claim based on that?

MR. FIELD: Well, our position is that they weren't getting superior results.

THE COURT: I understand that, but I'm trying to isolate your allegations to determine if it provides -- the allegation provides a basis for a claim and --

MR. FIELD: And it might. And what we're saying here -- this is kind of a novel claim, and we understand that. And you have seen in our complaint that we refer to this as what's called reverse churning, and reverse churning is when you charge an asset-based sales charge or an asset-based fee, and you don't do anything to earn it. You don't earn anything. You don't do anything. You don't rebalance. You don't get all the information that you need from your client in order to give them good, strong financial advise. You're

not doing anything to earn that fee.

And this is something that the regulators have identified. The regulators being the SEC and the Department of Labor have identified this type of an issue as something that requires further scrutiny because it's a conflict of interest the way this is being --

THE COURT: Has it been embraced by the Courts yet?

MR. FIELD: No, it has not.

THE COURT: So you want a judge in Atlanta, Georgia to do that?

MR. FIELD: Let me step back. It has been embraced by the Courts. They have looked at this, but they have been Courts where the SEC has brought the claim. It's not been plaintiff against defendant.

THE COURT: So how -- okay. Let's say that's all this case was about. How does a jury determine what the damages are? Let's say they agree with you that it was bad. They didn't -- I mean, you're saying, I guess, that they didn't rebalance. I guess you could prove perhaps that a prudent advisor like, you know, some other company that was doing this would have given -- would have rebalanced these and that could have led to greater returns? Is that what you would have to prove to get damages?

MR. FIELD: Or you could say that they charged money unnecessarily that they shouldn't have been charging. They

overcharged them and didn't give them the service that they were supposed to be giving them.

THE COURT: I don't mean this rhetorically, but what responsibility does the customer have to realize these things?

MR. FIELD: Realize which --

THE COURT: Yeah, when my phone calls aren't being returned, I'm not able to get investment advice, my results aren't good enough because of the lack of diversification and rebalancing, what role does that play?

MR. FIELD: You mean what duty does a customer have?

THE COURT: Yeah.

MR. FIELD: Well, if you look under the law, they don't have really any duty under the securities laws or the DOL. The duty is all on the fiduciary to do what's in the customer's best interest.

THE COURT: Okay. So you're saying there's not a -- for each customer there's not a mitigation issue?

MR. FIELD: They have a duty to mitigate, yes.

THE COURT: And part of that might be I don't want this service anymore.

MR. FIELD: It might be. Fire them.

THE COURT: I mean, we're looking down the road here, but then what does that do to your class certification when there's a requirement of mitigation that each individual customer might have based on their experience, because each

customer would have a different experience like, for example, on the customer service side, you know, when they call -- some may not call at all. I would guess most don't call. They just put their money in this fund, and they look at the result, if they do, and maybe compare it to something else if that information is provided or if they have access to it.

MR. FIELD: Well, this raises another point. At what point does Home Depot, should they have been looking at this? Should they have been contacting their plan participants? Should they have been overlooking and monitoring what they were doing?

THE COURT: Is that the term that Mr. Tetrick used as "polling"?

MR. FIELD: Polling, yeah, surveying, whatever you want to do, but Home Depot has that duty. If they appoint a fiduciary, they have that duty to oversee what they're doing and making sure that they're doing the right thing.

THE COURT: I'm going to guess you don't have a case where a Court has ever held that a fiduciary has breached their duty by not polling their -- not seeking customer feedback?

MR. FIELD: No, we don't. But this is just one of the things that they should have done. We think that they should have been looking at all of these things, not just that one piece but the whole process.

THE COURT: So the plaintiff seems to take issue with the very nature of -- I mean, this will go to the other motions to dismiss that we'll talk about, the very nature of a fee an asset fee-based structure; right? I mean, you don't -- it's not just the process that led to it and the amount of it. You don't like the way it was set up.

MR. FIELD: Or the way it was operating.

THE COURT: So how else should it have been then? So where they got -- how would -- and this is chargeable to Home Depot and their allegations because you said they could have changed it or maybe something else. If it wasn't the way it was done, then how would it have occurred?

MR. FIELD: Well, the way it would have occurred is, first of all, Home Depot would have gone out and found the competitive bids, what are these services, how much do others charge for this same service, what is it. And let's say they assumed that -- concluded that Home Depot -- Home Depot concluded that they were still the better service, Financial Engines. They've concluded that. They hired them. They paid more. And we're not saying just because they paid more it was necessarily bad, but they had a duty to go and see if these people were getting their monies worth.

THE COURT: But you don't like -- what I'm saying, though, is your complaint is also not that it was just too much and too much for what they got but that the way the fee

was structured was not the right way; right? I mean, you're saying that there should have been a different kind of way that the fees were calculated, not just a fixed amount based on however much was in the fund.

MR. FIELD: That was an option. That's an option that they could have analyzed, and they didn't.

THE COURT: So what was the other way that -- I'm trying to understand. What's the other way they would have done it?

MR. FIELD: They could have charged every time we're going to rebalance your account we're going to charge you a fee, period, and that each count would have been charged a different time that the account was rebalanced. That's how you would have done it.

THE COURT: So every time they sell stuff and buy new stuff to put in that fund, then they would be charged a fee --

MR. FIELD: Yes.

THE COURT: -- for their services not irrespective of what the cost was?

MR. FIELD: Yes.

THE COURT: I thought that's what the industry was moving away from to prevent the churning -- you used reverse churning for your claim -- but to prevent churning so that there's just not buying and selling for the sake of buying and selling.

MR. FIELD: They are, and they are moving away from that. But by moving away from that they've moved from one conflict, and now they've found another. And the other conflict --

THE COURT: But you complain about both. You complain about that the fee was too high the way it was structured, and then you say, well, it shouldn't be structured that way. It ought to be structured this other way, which is what Clark Howard and every other consumer advocate says you move away from. You move away from stuff that gives stock brokers -- these aren't brokers but similar analogy -- away from the opportunity to bill you every time they've changed, which seems particularly apt when you consider that there are similar stocks, and a stockbroker can go between one stock and another, get the same type of return, but earn a fee and not really substantially enhance your diversification or growth potential and all that; right?

MR. FIELD: That's right. And we're not saying you have to move away from one fee or the other. We're saying that you have to charge a fee that's reasonable.

THE COURT: But I thought your complaint against these other two people that we're going to talk to was that the fee was structured that way and that it was too much. Of course, I'm not sure how that's chargeable to them. I mean, they're in the business of making as much as money as they can

make. So if they could have gotten one percent, I'm sure they would have been happy.

But you also complain that the structure itself was the wrong kind of structure, and this seems like you've got to pick a lane. Know what I'm saying? You've got to pick which one of those you want to go with because if you go with both of them, you run the risk that nobody believes you on either of them. You know what I'm saying? It's like filing a hundred-page brief might make me miss the one page that's got something good in it for you, you know.

Anything else you want to say about Count II, which is the claim for prudence? And we've already dealt with, I think, the issue of loyalty.

MR. FIELD: I don't think I do, your Honor. I'll just close by saying, as we said in the beginning, we think that we have alleged more than adequate facts to allow you to infer that there was a breach of duty here.

THE COURT: Okay.

MR. FIELD: And we would like you to dismiss their motion.

THE COURT: Thank you, sir, or deny it. You mean deny it; right?

Mr. Tetrick, do you have anything else you want to say in response?

MR. TETRICK: No, your Honor.

THE COURT: Okay. All right. So, you know, I've got a lot of doubts about the case. I'm not sure that that's going to prevent -- is going to cause me to dismiss the case at this point in time other than the duty of loyalty, which I think has been conceded here.

So, you know, I understand there's conceptually a difference between state and federal court as it relates to motion to dismiss, but the rules are exactly the same if you look at them. I mean, there's just sort of a different practice, I suppose, because of *Twombly* and other cases like that.

I certainly buy the theory that I think everybody concedes, that Home Depot has a duty to give a good deal, the best deal that it can get for its customers. And the allegation is, the customers being its employees, and the allegation is it didn't do that relative to what it negotiated and relative to the fulfillment of its responsibility to maintain, you know, and look at the results that it was getting.

I'll just be honest and tell you I am unlikely to grant the motion to dismiss at this stage. That doesn't mean to forecast. That doesn't mean to forecast that that would be the same result while we're deciding the case on the merits, but I do believe most likely I'm going to need some additional help in that regard relative to testimony as to the actual

scenario on the ground.

So I'm not making a final decision right now. I'm going to go and read the cases that both of you, primarily that the plaintiff -- excuse me -- the defendant, the movant, has asked me to look at and I may very well -- once I make my mind up, certainly if I'm ruling in favor of Home Depot, I will probably have Mr. Lundy, who's the staff lawyer who will be working on this case with me, email defense counsel to assist with drafting of the orders in that regard, if that's where I go. Of course the order would need to be submitted, you know, electronically so in a way that we can make modifications.

Obviously if cases are dismissed, the Eleventh Circuit requires greater detail than if they're denied. So if the claims are denied, then we'll just do it ourselves. But, you know, I want to be fair as it relates to the arguments that you made. I want to go look at Judge Cohen's case that was cited as well as a few others. So I'll reserve ruling on it. And I can't tell you exactly when I will rule, but my general practice is to rule quicker rather than later. I don't think my memory gets better a week away than it will be right now.

All right. So I guess we'll set up shop now. If I could just have both of the other two defendants maybe come, you know, be prepared to argue, I will probably want to hear

from both of them before I hear from the plaintiff in response because the arguments are somewhat similar.

All right. Anything else, Home Depot?

MR. TETRICK: No, your Honor. Thank you.

THE COURT: Okay. All right. Thank you. So if y'all can just reposition or if you're ready to come up and argue, then I guess I'll hear whichever one wants to volunteer. Y'all filed it the same day, so it doesn't really matter who starts.

MS. ADAMS: Your Honor, I'll go next if it's all right, Financial Engines.

THE COURT: Okay. Thank you. Is anybody here for my hearing at 11:30? You might want to be very patient or -- I mean, it may be another 45 minutes or so before I get to you. Okay. Thank you.

And you're Ms. Adams?

MS. ADAMS: Yes, your Honor.

THE COURT: Okay.

MS. ADAMS: Good morning, your Honor. Your Honor, I'd laid out a number of points that I wanted to be absolutely certain that you understood. It's clear from your discussion with plaintiffs' counsel that you've understood a lot of the points that we've made, even though you were discussing Home Depot's motion. But a lot of them will apply, so I'll try to focus on just a couple of things.

One, I wanted to confirm what Mr. Tetrick said with respect to Count I that the claims regarding the performance of mutual funds have absolutely nothing to do with Financial Engines, that we had no responsibility and we're not alleged to have had with respect to any of those.

So with respect to Counts III and V, the fiduciary duty and prohibited transaction claims against Financial Engines, your Honor, I think we've already -- the Court has already discussed in detail the difficulties with plaintiffs' allegations regarding customer service and the outcome and the lack of loss. So I'd like to mention just to turn quickly to the idea of asset-based fees and, also, this idea that there was a motivation somehow, an inappropriate motivation on Financial Engines' part not to do any work.

Your Honor, Financial Engines was built on the idea and the belief that high quality investment advisory services ought to be available to everyone regardless of their wealth. And this is a case where Home Depot recognized that as well, that they are offering 20 some -- 20 investment options to participants, and they have a lot of participants who may not have the means to do traditional investment -- to obtain traditional investment advice where one might walk into a big office downtown and sit down with a guy in a pinstripe suit to walk through their finances.

They need something that's more appropriate and

designed for people with lower account balances, and Financial Engines developed this technology-enhanced way to take the theories of their Nobel prize winning economists, put it together with high-powered technological advances, and to provide a service that is different from traditional investment advising but still provides the type of advice that participants are going to need in this sort of situation. And to do that they gathered a significant amount of information from those participants.

They got information from Home Depot and the plan directly and also from those participants at the outset regarding such factors as their age, their risk tolerance, their investment horizon, savings, and other assets that the participants might hold either in tax qualified plans like perhaps spouse's 401-K or other taxable savings vehicles. They gather all this information and then conclude -- and, of course, as Mr. Tetrick mentioned, this is only if the participant opts into this service. Then Financial Engines will decide what is the optimal allocation among the investment options offered in the plan for this participant's purpose.

Now, once that's running Financial Engines is accused of setting it and letting it go. It's clear in the Form ADV that's referenced in the complaint and that we provided to you that's not what happens. The measure isn't how much work we

did anyway, but if it were, there's plenty of work being done on Financial Engines Advisors' part that it's not necessarily apparent to the participants.

As the Form ADV tells you, there's a monthly review that goes on where the technological devices will generate outputs that tell Financial Engines how much variance there is from the optimal investment allocation. And then actual human beings, the investment committee that's referred to in the Form ADV, not a committee of robots but of humans, takes a look at those variances and decides whether changes need to be made.

That's what's happening in the background, and it's not surprising at all that there are not very large numbers of trades being made. These are retirement plans. The purpose and the intent behind retirement plans is to plan for the long term, for the future, and that's even disclosed in Financial Engines' Form ADV, page 16, where we tell the public it's generally anticipated that the dominant mode of advice will recommend long-term purchases.

So, of course, there's rebalancing. There are changes to make sure that the participant is still in the optimal asset allocation band, but it's not day trading. Of course there are not daily changes and transactions going on at any given time. And in return for this ongoing asset management, Financial Engines charged a modest asset-based

fee. And I'm a little unclear, following the argument, whether plaintiffs are letting go of the argument that there's something inherently wrong with an asset-based fee. But I think the way I read the complaint was that was the entire premise, that there's something wrong with charging an asset-based fee because it creates this perverse incentive for us to do nothing.

THE COURT: So tell me, Ms. Adams, as you can understand it, for the claims that have been asserted against your client, tell me the bad things they say you did. Okay? One was it seems that they have inversely argued that you couldn't -- it was a violation of your duty by negotiating that fee to start with. So I'm going to say that's one of the things they said.

MS. ADAMS: Right.

THE COURT: That you allowed Home Depot -- you asked Home Depot to give you this kind of fee, and then as soon as it went into place, then you were in violation of your fiduciary duty. So one is the fee itself.

MS. ADAMS: That's number one. I think the second is poor customer service.

THE COURT: Okay. And this has to do with the phone calls --

MS. ADAMS: The phone calls.

THE COURT: Or lack of response.

MS. ADAMS: Lack of responsiveness.

THE COURT: Okay. What else?

MS. ADAMS: The third I have to read into the complaint and sort of read between the lines to get there, but I think there's some suggestion that we should have been doing more to affect the account allocation, the asset allocation in accounts, that we just weren't tinkering with them enough. I don't think that's fully articulated, but I think there's that implication there.

Would you like me to start with one of those in particular, your Honor?

THE COURT: As far as you can tell, those are the three things?

MS. ADAMS: As far as I can tell, yes, your Honor.

THE COURT: You can start wherever you wish.

MS. ADAMS: So in terms of the fiduciary duties, your Honor, I think this was quite clear. The case law is very, very clear that a plan service provider or fiduciary is not a fiduciary with respect to its negotiation of its own fees or its offering of its own fees. Plaintiffs have tried to draw some distinction between, well, okay, maybe not that but the collecting of the fees. We're carrying out the agreement that was negotiated. That's a distinction without a difference.

Certainly, your Honor, if we came knocking on Home Depot's door with a fee arrangement that was wildly

unreasonable, it would be up to Home Depot to decide whether or not to offer this service to its plan participants. They can tell us to go away. But it's not Financial Engine's duty to the participants, to potential customers, that it's going out and trying to get to have a particularly beneficial fee arrangement. That's the duty that Home Depot has admitted its had and it certainly does, and it's looking out for its participants at that time.

And it's very important to determine whether we were a fiduciary at that point because the Supreme Court tells us -- and I think almost literally every ERISA breach of fiduciary duty case that you will read starts with the citation, the *Pegram v. Herdrich*, that fiduciary duty is the threshold question, was the defendant acting as a fiduciary when taking the actions alleged in the complaint.

And here that's important because ERISA makes very clear this is perhaps the most fundamental principle of fiduciary duty in ERISA, that a fiduciary is a fiduciary only to the extent that it takes those fiduciary actions. So it's possible and commonplace to be a fiduciary for some things and not for others.

So Financial Engines did undertake a fiduciary duty here, and it was limited. The fiduciary duty was to properly allocate in a prudent manner the assets among the investment options that were made available to the participants. That is

the fiduciary duty that Financial Engines took on, but that does not make it a fiduciary duty with respect to its negotiation or acceptance of its own fees.

And, your Honor, I think there was a reference during your discussion earlier regarding rebalancing and that kind of thing. There is no allegation, no specific factual allegation in the complaint, that Financial Engines did anything imprudent with respect to that area where it did have a fiduciary duty. There is no allegation that there was -- that any participant's account should have been rebalanced and wasn't.

There's no allegation that, for example, a participant said he was going to -- he was 35 years old, and the Financial Engines Advisors crafted a portfolio for him that was appropriate for a 60-year-old. Those are the types of things that could be plausible in this situation and fall under the fiduciary duties that Financial Engines actually had, and there is nothing like that in this complaint.

Those types of things could have led to damages if you were able to show say this is the asset allocation that was appropriate, and this is what I actually got. But there's nothing in this complaint that suggests that in any way, shape or form. Instead, it's the discussion of, well, they didn't answer the phone -- and I won't belabor this point, your Honor, because I think you went into it earlier. But there is

no harm articulated from any failure to answer the phone.

It might have been a different situation if one of the plaintiffs had been able to say I called to tell you this "x" fact that is among the things that you consider -- have disclosed to you that you consider when crafting my asset allocation. I was going to tell you this fact. You didn't answer. If I had told you this fact, you would have changed my asset allocation. Because you didn't, my assets didn't perform as well, and I was harmed. That isn't the complaint that we have here, your Honor.

Your Honor, I think that addresses all three of the types of alleged breaches. Are there any further questions on that?

THE COURT: I have any questions.

MS. ADAMS: Let me just address a few points, if I might, that I think go to some demonstrably incorrect or at least confusing aspects of the complaint, and one is this idea that there were inappropriate layers of fees because the mutual funds charged fees and Financial Engines also charged fees. Those are two entirely different types of fees. Of course when an investment advisor to a mutual fund is deciding what's going to be in the fund, that advisor is selecting individual stocks and deciding what the fund will be that is offered to the general public to plans like this around the country.

Financial Engines is doing something very different, taking a look at the 20 or so investment options offered in the plan and saying how should we choose among this menu. They're two different services. By saying they're duplicative, I think plaintiffs are raising an issue -- for example, if I were to offer a service that said I would go to a restaurant with you and I'm going to -- if you pay me, I will tell you exactly the best things to choose from the menu because I know this restaurant really well and I know what you like, pay me a fee for it, they're saying it would be duplicative if the restaurant then charged a fee for the food that they provide. Two entirely different things in that section of the complaint, adds nothing to the claims here.

Second, your Honor, I would respond to the idea that Financial Engines Advisors services were redundant or unnecessary because there are Target Date Funds in the plan. That's an apples to oranges comparison, your Honor. A Target Date Fund asks a single question, and in paragraph 105 of the complaint the plaintiffs make this reference. And that question is, what year will you retire? And they're offered in five-year increments typically.

So if your answer is, well, I'm not going to retire in 2030 or 2035, I'm going to retire in 2033, I would like more personalization, I would like to have more adjustments to the asset allocation so that I can craft my portfolio more in

line with who I am, then that's a time when Financial Engines Advisors might make more sense. And Financial Engines is not asking just that single question about when you're going to retire. They're asking many more questions that we talked about earlier and including, what are your other assets? Are they held in taxable and nontaxable accounts? What's your risk tolerance? All of those things are the services Financial Engines offers, which is much more robust than what a Target Date Fund offers.

Your Honor, if you have no other questions on fiduciary duty, would you like me to discuss the prohibited transaction claim?

THE COURT: I'm sorry. Discuss what?

MS. ADAMS: The prohibited transaction claim.

THE COURT: Sure. So, your Honor, this is a situation, I think, where the plaintiffs seem to be floundering around a bit to figure out what the claim should be. They first raised claims under ERISA 406(a), and we made a motion to dismiss and explained why that subsection did not apply. They came back with claims under ERISA 406(b)(1) and (2). We explained in our motion to dismiss why 406(b)(2) doesn't apply. In their brief they said, oh, okay, you're right, we're dropping 406(b)(2). We need to plead 406(b)(3). Let us replead.

Your Honor, the reason they're having such a hard

time is because it's not a prohibited transaction to collect fees that you're owed. It's not a prohibited transaction for a plan or its participants --

THE COURT: I don't really need to hear any argument more about that.

MS. ADAMS: Your Honor, that's all I have, unless you have any other questions.

THE COURT: I do not. Thank you.

MS. ADAMS: Thank you.

THE COURT: All right. So Mr. Martin or Ms. Amert? Is it Amert? Is that how we say it?

MS. AMERT: You're the judge so --

THE COURT: How do you say it?

MS. AMERT: I say Amert.

THE COURT: Amert. Well, I say it Albany. How do you say it? Are you from Georgia?

MS. AMERT: I am not.

THE COURT: You'll most likely say it incorrectly.

MS. AMERT: Your Honor, I will be brief. A little bit of context setting since there are a number of overlapping claims, a number of parties before you. My client, Alight Financial Advisors, took over the role of providing these investment advisory services from Financial Engines in July of 2017.

THE COURT: So is it true that when you took it over

and you subbed out some responsibilities, that the fee was otherwise -- remained unchanged?

MS. AMERT: It's accurate if that's what -- that's what the complaint alleges. It's actually not my understanding that that's accurate. But we're here on a motion to dismiss, so we'll go with that, that the fees remain the same. There is no increase in fees.

THE COURT: Okay. All right.

MS. AMERT: And, your Honor, it's also accurate that once AFA, which I'm going to use because we use it in the brief and it's shorter than Alight Financial Advisors, took over the role of being the investment advisor, it subcontracted with Financial Engines to do the automated and investment advisory services that Ms. Adams was primarily describing.

AFA took over the direct fiduciary responsibility for the advice and AFA also -- AFA takes over responsibility for everything from the perspective of Home Depot and the participants. There's a separate contract with Financial Advisors to do some of those services.

Other services like communications with participants, online investment advice, which is what we think of when we say advice as opposed to automatically rebalancing accounts and that kind of thing, was taken over by AFA. So AFA is in this case starting in July of 2017 and through the present, so

when the original complaint was filed. They've been providing these services for about six months.

The allegations against AFA are quite similar to the allegations against Financial Engines. Count IV alleges a breach of the duties of prudence and loyalty against AFA. Count V is actually the same prohibited transactions claim as is asserted against Financial Engines.

THE COURT: I'm sorry. What was the last one? V?

MS. AMERT: Count V. And that's the prohibited transaction claim. Both of these claims, big picture, your Honor, are precluded by the decisions of the -- the reasoning of the four other Courts who considered these exact claims. They are an attempt to replead the rejected theory that a fiduciary is responsible for upholding its fiduciary duties when negotiating its own compensation. That theory has been rejected by the Courts both because the case law is clear that just because you're being hired to be a fiduciary doesn't mean you're not entitled to negotiate a fee and make a profit and because of the nature of ERISA's fiduciary duties.

So ERISA is kind of a strange statute when it comes to fiduciary duties. Traditional trust law you didn't allow a trustee to have an adverse interest to beneficiaries. ERISA changes that model and moves the fiduciary duty around, like to be sliced up into pieces, depending on the various roles of the fiduciary.

So here your Honor has the fiduciary responsible for negotiating things like fees on behalf the plan and the Home Depot defendants and then has AFA and Financial Engines, who are fiduciaries with respect to the investment advice services that they provide but --

THE COURT: Obviously, if you're given advice, either of you, are given advice to invest in funds that somehow benefit your company as opposed -- well, I mean, I guess if you had had a fee-based structure that was where you got fees based on the transactions and you were directing them to certain stocks that generated higher fees because of purchase price times whatever the percent is, there might be an allegation with regard to that.

MS. AMERT: That might be an allegation --

THE COURT: But that's not what we have here.

MS. AMERT: That's not what we have here. To pick up on a comment your Honor made earlier, if we had a transaction-based compensation model, we got paid every time a trade was made and there was evidence that we were making trades in order to generate fees for ourselves instead of because it was the right thing to do for the plan participants, that might be a claim. But that's not alleged here either.

THE COURT: So other than the complaints about phone calls and stuff like that and that your fee was unreasonable and so when you collected it, that was a breach of fiduciary

duty, the main argument is this reverse churning theory; right? That you didn't do anything because it benefited you not to do anything. It kept costs low, your own internal stuff that you wouldn't have to do if you were active. And then you got fees that were already set based on whatever the value of the investment was. So you just did little to nothing for money is essentially what they're arguing.

MS. AMERT: That is what they argue. It's not --

THE COURT: You should have been doing more. So if we would cut apart the fee itself, then they'd just say you should have been doing more.

MS. AMERT: I think that is what plaintiffs are alleging here, you should have been doing more, and that's certainly what they're arguing in their brief. I think if you go back to the complaint and try and parse out what's pled in the complaint that we ought to have been doing that we weren't doing that had any impact on the returns that the participants got at the end of the day, it's not there.

So in the briefing you hear and from plaintiffs' counsel you hear complaints that rebalancing should have happened more often. Not only does the complaint not plead how frequently rebalancing should have happened or plead, you know, what the negative impact of infrequent rebalancing was and there's no harm pled, it does not actually specifically say you should have rebalanced a certain number of times and

you didn't do that.

Instead, what plaintiffs critique is the general approach to retirement plan investing that was implemented first by Financial Engines and later by AFA. And that is the general buy and hold strategy. It's the idea that for a retirement investment in particular the best approach is to take a long-term view, to stake out particular positions, and hold them for a long period of time; that doesn't mean you never change it, but frequent trading can lock in losses. It does generate some transactional expenses for the plan, and long term it doesn't improve investment performance.

So I believe that your Honor has put your finger on it. It is the set of stuff that they describe as reverse churning that seems to be different from the previous cases that rejected the critique of asset-based fees, but there's no specificity as to what AFA or Financial Engines should have been doing differently. And, more importantly, from the perspective of trying to establish whether there is an actual fiduciary breach, there is no injury to the plan that's alleged as a result.

There's no -- there are a couple of conclusory allegations that but for these services, the participants could have had relative better returns, I think, or relative positive returns. But there's no follow-through or explanation as to how that would have happened, how they

generated worse returns using these services than they would have had they not used these services or had they used an alternative approach.

I would just point out that plaintiffs' point to Target Date Funds as an alternative that might work better. That was an option for the participants in this plan if they wanted to use it, and as your Honor heard this morning, plaintiffs are also dissatisfied with the performance of Target Date Funds that were offered in this plan. There's just not a connection between the allegations about the way this business was conducted and the damages that plaintiffs are seeking.

THE COURT: So let me make sure I'm right about this. There's no allegations like against Home Depot and these benchmarks. There's really -- because each individual, what is appropriate for them based on their risk averse status and goals generally some -- I guess some investors might have had social issues that would guide their investments. Is that also a function of what they would have been asked?

MS. AMERT: So you're right that there are no --

THE COURT: Because each person is different as to what they want or need.

MS. AMERT: Right.

THE COURT: There's nothing to really compare to try to come up with a damage like there is this benchmark that

they want to argue about I guess Home Depot generates its funds.

MS. AMERT: I think that's right. Everyone making their own investment decisions; right? Doing their own 401(k) allocations presumably would come to a different conclusion; right? So if you were going to try to compare my account as I would have allocated it versus my account as the Financial Engines' methodology that Ms. Adams described would have allocated, it would be different than if we tried to do the same thing for you.

Everyone is differently situated, but even for the named plaintiffs, your Honor, the complaint doesn't articulate what that difference is or what they, you know, should have gotten if we had somehow done a better job, and without that they really can't establish the loss to the plan element of a breach of fiduciary duty claim. And I think that is the primary point.

The other point I want to make, your Honor, is that the plaintiffs themselves plead that Financial Engines is operating in a competitive marketplace, and all of the other kinds of options that the plaintiffs identify in the complaint also charge asset-based fees. And that's because asset-based fees for investment advisors or investment fund managers align the interest of the investment advisor or manager with the interest of the plan participant.

You want your financial advisor to have an interest in your account balance going up, and a straightforward way of doing that is to use an asset-based fee. If you create other incentives by, for example, a transaction-based fee, you create the opportunity for a conflict of interest between the plan participant and the advisor. You would prefer not to do that.

Unless your Honor has additional questions, that's really all that I wanted to cover. I'm also happy to talk about the prohibited transaction claim, but I'm guessing you don't want to hear from me about it anymore than you want to --

THE COURT: I've read what both sides have written about that. All right. Thank you.

MS. AMERT: Thank you.

THE COURT: Mr. Field, are you going to argue this one as well or --

MR. FIELD: No, sir. Mr. Tracey.

THE COURT: Mr. Tracey is? Okay.

MR. TRACEY: Thank you, your Honor. The gravamen of what we argue, what we allege Financial Engines and later AFA committed as fiduciary breaches is that they failed to adhere to the minimum standards, the minimum standards that are required by law of investment advisors. Our clients and the members of the class paid for investment advisory services,

and they didn't get investment advisory services that met fiduciary standards. They didn't get what they paid for.

Now, for over 55 years, your Honor, for over 55 years since the seminal United States Supreme Court case *Capital Gains Research*, it has been the law that investment advisors must, quote, furnish to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments. We allege that Financial Engines and later AFA wholly failed in this regard.

Here are some of the allegations: One, Financial -- and remember this is an investment advisor. Financial Engines enrolls participants based on an unduly simplified questionnaire. What does the questionnaire ask? It simply asks participants to select for themselves, for themselves the type of portfolio they want, A, B, or C, conservative, moderate or risk.

Now, opposing counsel suggested that Financial Engines was sort of the equivalent or was designed to be an equivalent for folks who didn't have as much resources to the person downtown in the office in the pinstripe suit. But Financial Engines still has the same obligations as that person in the office in the pinstripe suit.

So imagine you walk into that office, and this person promises you, like Financial Engines promises, we're going to provide you professional management, professional management

of your account. You walk into that office, and the person sitting behind the desk lays out some options for you and says, we've got small, medium, and large. What would you like? That's essentially what's happening to our clients. Now, I think everyone would say that's ridiculous. I'll never pay an investment advisor, someone who has a fiduciary standard, who is supposed to meet fiduciary standards, to offer me small, medium or large and have me select for myself. But that's what we allege is going on here.

THE COURT: So how would you get to the -- if you didn't have the advice, how do you get to the conservative, moderate or aggressive portfolio?

MR. TRACEY: I mean, that's a great question. I don't know what basis a plan participant has to select conservative, moderate, aggressive.

THE COURT: That's my point. So if the investment advisors are putting together the stocks that they believe meet conservative, aggressive, and moderate, then what's the problem with that?

MR. TRACEY: Because what investment advisors must do is provide personal -- as the Supreme Court said, investment advisors must provide on a personal basis competent, unbiased, and continuous advice.

THE COURT: I don't see the conflict you're talking about. A personal basis is what is it that you want? You

know, do you want to be aggressive? Do you want to be conservative? Do you want to have a mixture? So, I mean, those are three different options; right?

MR. TRACEY: They're three different options, but you need guidance as to which option is appropriate for you. I'm an employee of Home Depot. I'm trying to figure out, you know, what's right for me. I'm not an investment professional. I'm trying to figure out do I need a moderate one? What's the difference between moderate and conservative? What's the real distinction there? And, by the way, you know, I just inherited a whole bunch of money from my uncle, my estranged uncle. How does that affect my finances? Oh, I just lost my spouse. How does that affect my finances? I just got fired from Home Depot. I'm still a member of the plan. I got fired from Home Depot. I lost my job. How should that affect my finances?

Our participants, our clients are simply left with, well, you choose. That's not what a financial advisor does. That's not what an investment advisor does. That's not the standard that they're required to meet. They're fiduciaries like lawyers, like lawyers. Imagine you go into a lawyer's office and you say to the lawyer, I've got this legal problem. I don't know what to do about it; right? And the lawyer says, well, you've got Option A, Option B, and Option C. You choose. I'm not giving you any advice; right? We'd all say

that's a breach of the lawyer's fiduciary duties.

And what we're saying is at the initiation of our clients, the plan participants' engagement with Financial Engines, that same type of breach is happening. They're not giving you the advice. They're not taking into account all the information that you -- that they need to advise you as to what's the difference between moderate and conservative. Frankly, standing here today I'm not sure I know what the difference is.

How is a plan participant, the thousands and thousands of employees and former employees of Home Depot, how on earth are they supposed to know which one is appropriate for them? They can have a sense of what it sounds like, what the word means, but what the nuts and bolts are they need financial advice for. And that's what they're paying for, and they're not getting that. And that's the fundamental issue that we see here, and it goes on. That's just the initiation. That's just the first step.

What happens going forward? Is Financial Engines following up with the participants in any way? I don't care if it's AI following up. I don't care if they get an email that's generated and sent to them, and they fill out a form. It can be AI. We're not saying AI is per se bad. We're not saying computers are per se bad. What we're saying is there should be some follow-up happening because things change.

Things change.

I might inherit that wealth from my estranged uncle. My spouse might pass away. I might lose my job. Where can plan participants, our clients, provide that information to Financial Engines and later to AFA? We allege they don't have that, that there was no follow-up. There's no ongoing, as the Supreme Court requires, ongoing continuous investment advice. It's not happening, and that's the second problem that we see here.

Now, it's not just a customer service issue. It is an investment advisory issue. This is what investment advisors are required to do. This is why you pay for an investment advisor. Going forward when our -- and this is even more disturbing, and it's somewhat disturbing that it's even described by defendants as a customer service issue. Our clients instructed -- wanted to instruct I should say, wanted to instruct Financial Engines to change the asset allocation in their accounts, to make changes, to move from conservative to moderate. And guess what, didn't happen.

That is a clear breach of fiduciary duty. So it's not just a customer service issue when no one is picking up the phone. It's a fiduciary issue because you can't give instruction, the fiduciary, if no one is picking up the phone.

Based on what we've alleged, there's really no way for our clients -- we don't believe there was any way for our

clients to get the message to Financial Engines that, hey, I need to change my account. I need to go from conservative to moderate. I need to go from small to large. It was never available to them. And what we're saying is that an investment advisor is required -- just like an attorney is required to follow his or her clients' instructions, an investment advisor, also a fiduciary like an attorney, must follow their clients' instructions.

And we're saying that Financial Engines and AFA don't do that. They don't even make it possible for our clients to do that -- for the plan participants to do that. That's the fundamental issue that we see here, and that is why we think it's a breach of fiduciary duty.

And if you look at the sources, if you look at the sources that we cite throughout here, this is an issue that has been addressed by the SEC. It's also in the ERISA regulations. The SEC, the SEC staff study in January 2011 said that investment advisors have a duty of care required to make a reasonable investigation to determine that it's not basing its recommendations on materially inaccurate or incomplete information.

ERISA, the regulations interpreting ERISA, require that appropriate consideration to those facts and circumstances must be given to those facts and circumstances that a fiduciary knows or should know are relevant to a

particular investment or particular course of action involved. And, of course, when the SEC has looked particularly at robo advisors, it said, it admonished them to, quote, elicit sufficient information to allow the robo advisor to conclude that its initial recommendation and ongoing investment advice are suitable and appropriate for that client based on his or her financial information and investment objective.

They're not -- these are plain -- this is plain black letter requirements for investment advisors. It's 55 years old and announced by the Supreme Court, and we allege that, simply put, our clients are not getting it.

THE COURT: So what are your measure of damages?

MR. TRACEY: Two ways, your Honor. Two ways, your Honor. First of all, our clients are paying. As I said, our clients are paying for a service, and they're not getting that service. That's a loss. That's a loss. Essentially what they're getting is akin to a Target Date Fund. Now, there may be one or two factors that are slightly different, but there are other types of funds out there that do essentially the same thing that are basically -- and I think as counsel for Financial Engines described, they're allocating investments in portfolios.

Well, it's what a mutual fund manager does; right? So they weren't paying for a mutual fund; right? They're not paying fees for a mutual fund service. What they're paying

for is an investment advisor, which is a much more involved service than simply just allocating funds. So the difference, they're paying for something they didn't get, they essentially were cheated out of. They were cheated out of services, and the loss is the additional amount of money that they paid over the services that they got. That's one way.

And a second point, your Honor, is that ERISA doesn't require loss to the client. When a fiduciary -- and there's no doubt that Financial Engines and AFA are fiduciaries. 29 USC Section 1109(a) says a fiduciary who breaches its fiduciary duties under ERISA, quote, shall be personally liable to restore to such plan any profits of such fiduciary which have been made through the use of assets of the plan by the fiduciary.

They have to restore their profits to the plan because they used the plan in breach of their fiduciary duty. They used the --

THE COURT: How do you fit that into your allegation, sir? All you did was quote me the law. How does it fit here if you can't show that your clients would have made more money if they had had different advice? You haven't even alleged that, I don't believe, have you?

MR. TRACEY: First of all, your Honor, I believe we do allege that, essentially when we're talking about the fees that they're paying for.

THE COURT: Well, the fees are different. The fees are totally different. I mean, I understand you could say, well, those are fees if they weren't taken, would have been invested, and they would have made some money. That's not what I'm asking you about. I'm asking you about if your allegation -- is your allegation other than the fees and any profits that would have been generated on those fees, is it for the balance of the money? Are you claiming that they would have made additional monies based on different types of investments?

MR. TRACEY: I think that's something that we'd have to --

THE COURT: Have you alleged that?

MR. TRACEY: I think we've alleged that it was nearly impossible. The way these investments are structured was nearly impossible for them to turn -- to get positive returns on their investment. So, yes, I think we have alleged that.

THE COURT: With what facts?

MR. TRACEY: Beg your pardon?

THE COURT: With what facts?

MR. TRACEY: Well, I think it's with respect to fees, but I want to explain something.

THE COURT: Tell me what's in there. Don't give me lawyer speak. All right. Tell me what's in there. That's what I'm looking for.

MR. TRACEY: Okay. So what's in there is the fact -- this is what --

THE COURT: The fees, I understand the fees argument.

MR. TRACEY: Right. What's important to understand is that fees and performance are two sides of the same coin; right? I don't get good performance if I have high fees because, guess what, my performance is eaten up by my fees. And so what we're saying here, your Honor --

THE COURT: Mr. Tracey, I understand the fees part. Is there anything else that you've alleged specifically? Are you alleging that any of the named plaintiffs would have had higher profits to the amount of money other than the fees and what the fees could have compounded to?

MR. TRACEY: Here's the problem. Thank you, your Honor. Thank you for directing me there. Here's the problem. We're dealing with a 401(k) plan, the Home Depot plan that doesn't have sound investment options, so our plan participants are kind of in a catch-22 here.

THE COURT: But you can't cross pollinate this because these defendants are only responsible for what they're responsible for.

MR. TRACEY: But you asked me what --

THE COURT: So your answer is no.

MR. TRACEY: My answer is --

THE COURT: It's okay to say no.

MR. TRACEY: No, my answer -- I will say I think we do allege very clearly and I can find the --

THE COURT: It's got to be more than conclusions.

MR. TRACEY: Well, it's not a conclusion because we show you how the fees eat up the performance.

THE COURT: You want to keep talking about the fees. Okay. I understand your fee argument. I'm not talking about fees. I'm not talking about what the fees would have generated. I'm talking about everything else. So let's say the fees were 10 percent, awful high, but we'll just assume it. For you to prevail on the other 90 percent, you've got to show me that your clients would have had 90 percent or they would have made more money if they had gotten their phone calls answered, if they would have gotten it rebalanced in some way, if they'd gotten it moved from aggressive to moderate. In fact, really I guess that only really works if there's been sales.

I mean, you've got to show that. I'm sensing that you can't show that, you don't even really want to talk about it.

MR. TRACEY: Well, I can't say -- you're right. I can't say that we have that alleged in the complaint because the problem is there are other options, the other options that were available --

THE COURT: And they're bad too. Yeah, but at some

point you have to put a flag in the ground; right?

MR. TRACEY: And the flag we're planting is that they paid for something, and they didn't get what they paid for.

THE COURT: Okay. I understand your argument on that. Then let's focus on what you really -- you want to define the universe as really big, and then you want to talk about what's really small because invariably a five percent, a half a basis point, not even five percent, a half a percent fee is not going to be as much even with the growth that it would have obtained if it hadn't been paid, all things the same, being, you know, ceteris paribus, if that's the right economic word.

So I'm just trying to make sure I understand your claim. I think I do. All right. Anything else that you haven't had a chance to argue about your claim?

MR. TRACEY: Well, I just want to make a quick point about their Form ADVs, which they use as sort of counter allegations. And, of course, their Form ADV -- first of all, the Court cannot take judicial notice of any -- the Court can take judicial notice if this is a document that's filed and the document says this. But the Court, of course, cannot take the document for the truth of matters asserted therein. So simply because their Form ADV says they do something doesn't mean that they actually do it. And we dispute that they do certain things that they say in their Form ADV.

Furthermore, the Form ADV, things that they say, oh, we do because our Form ADV says we do this, the Form ADV actually says they may do it. It doesn't say they actually do do it.

And, finally, as I mentioned, because there are reasonable disputes about the validity of the document, there's a question as to whether the Court could even take judicial notice of it. So that's our --

THE COURT: When you take judicial notice, you're just taking judicial notice of its existence; right?

MR. TRACEY: Essentially.

THE COURT: Without having to lay a foundation for what it is.

MR. TRACEY: I mean, that's what they've asked you to do, and we think that at a motion to dismiss certainly --

THE COURT: You're just saying it's filled with hearsay.

MR. TRACEY: Essentially, yes, essentially. And the one other point, just to go back on the loss point -- I just want to make sure this was clear -- is that because ERISA is dealing with trust law, if a fiduciary breaches its duty and earns profits because it breaches its duty, it has to disgorge those profits back. That's in the statute. And so there's all this -- you know, there's been a lot of talk, and there's a lot in defendants' briefs about we didn't plead loss. Well,

we said that. In our response we said ERISA requires a breaching fiduciary to disgorge its profits. There was no response in their reply to that point.

THE COURT: Can't argue with the law.

MR. TRACEY: Exactly, exactly.

THE COURT: All right. They just say they haven't breached it.

MR. TRACEY: They have claims about -- right. They have arguments about breach but in terms of --

THE COURT: But you are just talking about fees, but you don't want to limit it to that. You're talking about fees and what they would have been if they hadn't been paid, what they could have turned into. Obviously when they're subtracted out, then they can't compound and grow. And so I understand all that but -- I got it.

MR. TRACEY: Got it. Thank you, your Honor. Thank you. The one other point I want to make is we're not complaining that asset-based fees are per se bad. We're not. What we're saying is asset-based fees create bad incentives, and these defendants acted on those incentives by claiming to provide professional management but not actually providing it. That's that in a nutshell.

THE COURT: Okay. You're going to talk about the prohibited transactions? Or you just want to let that go? Because I know where it's going.

MR. TRACEY: If your Honor knows where it's going --

THE COURT: How is it not arguing the same thing that the Courts have said you can't argue? Because if you want to come back and say, well, but your services didn't justify it, well, that's arguing about the services, and that's arguing about breach of fiduciary duty. Has nothing to do with the fee itself. The fee itself -- it's not a breach of fiduciary duty to have negotiated the fee. You agree with that; right?

MR. TRACEY: It's not -- it is not a breach of Financial Engines' and AFA's duty to negotiate the fees, breach of Home Depot's, yes, but Financial Engines, yes, I agree, your Honor. I agree.

THE COURT: Okay.

MR. TRACEY: I agree. I will let your Honor -- I will rest on the papers with the prohibited transaction claim.

THE COURT: All right. Thank you.

MR. TRACEY: Thank you, your Honor.

THE COURT: Do either of the two defendants want to be heard in response? Okay. Yes, ma'am.

What about his point that people were not able to make changes? He says their allegations are they wanted to change from moderate to aggressive, and they weren't able to and that they suffered harm because of that. I didn't -- maybe they did, maybe they didn't. But because they weren't able to make the change that they wanted to make and were

entitled to make, that your client didn't earn whatever they were charging.

MS. ADAMS: Sure. And taking the complaint as pleaded and setting aside whether there were electronic or other means to communicate with Financial Engines, I agree that there could be some case that some plaintiff could plead somewhere where they could say I had information to tell you, you did not find a way for me to get it to you, and as a result you provided me inappropriate investment advice and I was harmed as a result.

In theory that could state a claim. There just aren't those allegations in the complaint. We have the allegation that Mr. Pizarro called and wanted to change his asset allocation. That's all it says. But the --

THE COURT: No, it's a little bit more than that, though, because what he's also saying is because you didn't provide me with an opportunity to make that change meaningfully, then you didn't earn any money for me. I mean, that's his allegation. So I want my money back, and I want what I lost, all my opportunity costs for that money too.

I mean, clearly he's not alleging that his investment globally suffered because of it, but he is saying that you took stuff from him that you didn't earn. I mean, like paying -- use a lawyer. I'll pay your retainer. I expect you to take my call and provide me advice and listen to what I

have to say, and you wouldn't take my call. My wife is a psychologist, so maybe that's a better example. I pay you money to listen to me. You wouldn't take my call, and you didn't listen to me.

MS. ADAMS: Right.

THE COURT: So you didn't earn what I've paid you. You didn't earn that retainer.

MS. ADAMS: Right. Your Honor --

THE COURT: Does that not state a claim?

MS. ADAMS: No, your Honor. It doesn't state a claim because they have not alleged any harm from that.

THE COURT: So he doesn't -- does he have a contractual relationship with your client? I mean, the breach of fiduciary duty exists, but does he have a breach of contract cause of action? If he's paying for something he's not getting, that's a breach of contract we'd normally assume. Does he have standing to bring a breach of contract claim?

MS. ADAMS: He may have standing. It would be preempted by ERISA's broad preemption --

THE COURT: So really the only thing he can do is bring a breach of fiduciary duty claim.

MS. ADAMS: Right, your Honor. And the reason I wanted to come up here was to correct the point of law, and that is the idea that Mr. Tracey presented that a plaintiff does not have to allege a loss to state a breach of fiduciary

duty claim. That is incorrect. The fact that the statutory provision provides for the, in certain circumstances, the recoupment of profits goes to remedy. There could be a remedy that the Court could devise as more appropriate.

THE COURT: How is the loss not what he paid for the service if he didn't get the service? That's his allegation. So he said I didn't get the service, but I paid for it so there's my loss at least as to that.

MS. ADAMS: Your Honor, didn't get the service, I think, would be we did not take in his information, allocate the investments.

THE COURT: But the way you argue it is it's a one-time shot because he's saying we had -- I mean, I understand that there's going to be evidence otherwise when we get to the evidence stage -- that he's saying I didn't have a chance to make changes.

MS. ADAMS: I'm certainly not arguing it's a one-time shot, your Honor.

THE COURT: So if the allegation is that he had no way to communicate different preferences in different situations after the initial changes were made -- that's what Mr. Tracey argued -- then your client didn't have a duty somehow? That wouldn't be a breach of its duty if it didn't provide a means for him to communicate those different preferences? Because he's paying on an ongoing basis every

month. There's that fee that's being taken out of the fund or maybe it's quarterly or yearly. I don't know. So that financial advice component he argues, Mr. Tracey argues, is ongoing, not just once.

MS. ADAMS: Right. And I think it's clear from the complaint that there were ongoing services from the Form ADV that was --

THE COURT: You were doing stuff in the background. You were doing your balancing. You were doing all the -- I'm assuming there would be evidence of tinkering with the algorithms and all that kind of stuff that helped determine what to buy. But you've got to have the input for that algorithm to run, and plaintiff says they wanted to change the input and that they couldn't.

MS. ADAMS: Right. I understand that, your Honor. They say that there was no opportunity. When they say there was 45 minutes on hold, maybe one participant didn't -- but, there again, did he get no investment advisory services whatsoever?

THE COURT: Because he didn't get what he wanted, which was his preferences to be used by you in helping to formulate where he was and decide -- have your formula decide what he should get.

MS. ADAMS: Your Honor, I would submit that he states that in a most conclusory fashion without any indication what

he was trying to communicate, whether he ever was successful in communicating, whether there were other options for communications, and how that led to him not receiving the investment allocation advice that he paid for.

THE COURT: So what was he supposed to say? If he said if I tried to reach them, I couldn't get through to them to tell them what I wanted -- and they do have some specifics. We were put on hold. We couldn't get through. Calls weren't answered. Calls weren't returned; right? And so couldn't tell them, couldn't the defendants what my changes would be so that they could give me the advice and change -- you're right there may have been no actual change in what you would have recommended, you being Financial Advisors or Alight in the other situation. But they're saying I didn't have a chance to communicate that to you, and so you didn't earn the fee that is associated or maybe part of the fee that was associated.

MS. ADAMS: And, your Honor, as you brought up several times, looking down the road, if that kind of claim were to go forward, how would they show that there were damages there? How would you measure the fact that someone waited 45 minutes and some of -- one of the participants, I believe, did get through. And how would you say we provided you ongoing investment advice and allocation? How would you weigh that fee to say you've got the service you paid for versus what you didn't?

THE COURT: I don't know.

MS. ADAMS: I don't know either.

THE COURT: But at the same time I'm trying to -- I mean, it almost seems like your argument is that you, at least for this stage, is that you had no duty to modify once it starts if they need to communicate differences. I mean, I know you don't agree with that factually, but that's after motion to dismiss stage. So I'm at the motion to dismiss stage. Don't you agree that there is a fiduciary duty to receive the information that the clients want to communicate for purposes of deciding what's best for them?

MS. ADAMS: I believe there's a fiduciary duty to make a prudent asset allocation.

THE COURT: Based on what they want; right? Right? What they want. That's why you ask them questions; right? You ask them questions to know what they want, and you're using that, what they want, as a major factor in what you recommend.

MS. ADAMS: What they want in terms of how aggressive they want to be, that is one consideration, right. I believe there's a fiduciary duty to make a prudent allocation decision if there --

THE COURT: You agree it's ongoing; right?

MS. ADAMS: Yes.

THE COURT: So if someone says theoretically I want

to be aggressive, and they have some kind of change in their life that causes them not to want to be aggressive anymore -- maybe they've become more conservative because of their fear of what's going on in politics, or whatever, and they want to be more conservative, you've got to be able to react to that; right?

MS. ADAMS: Right. And I think the complaint is inadequate in alleging that there was not a method for doing that.

THE COURT: Okay. So how would it have been adequate? If they say we called the numbers and we couldn't get through, what more are they supposed to say?

MS. ADAMS: Your Honor, what they were offered was, in addition to the numbers that were provided, online interface --

THE COURT: That's what you're telling me now; right? Is that in the complaint?

MS. ADAMS: It's in the Form 10K and the --

THE COURT: You understand that's hearsay; right? I mean, am I able to take what's in there as the truth of the matter asserted?

MS. ADAMS: They are referenced in the complaint.

THE COURT: That document is referenced in the complaint?

MS. ADAMS: The Form ADV and the Form 10K, yes, sir.

THE COURT: Referenced how? Tell me about that.

MS. ADAMS: When they're describing the services that Financial Engines provides.

THE COURT: All right. So finish what your thought was on that then. So in that form it says what?

MS. ADAMS: It discusses that they're providing an online and electronic interface and continue to gather this type of information.

THE COURT: Does the form have anymore specifics about this is how people contact us, this is what we do when they do, this is what -- anything like that?

MS. ADAMS: I'd have to take a look --

THE COURT: As opposed to generic online? I mean, I've dealt with a lot of online companies that I never get responses to, you know, myself. And Southwest Airlines has a great airline portal, but they don't respond. If you tweet at them, sometimes they might but -- because everybody sees that. But the online stuff they're not real good.

MS. ADAMS: And I understand the frustration, your Honor, but whether it's a breach of fiduciary duty is --

THE COURT: Well, it could be right if they're -- you don't disagree with the fact that your duty to make changes exists if the customer expresses information that they want to change; right?

MS. ADAMS: I would caveat that a little bit, your

Honor.

THE COURT: You don't have the independent right to do what you think is best for them even if it's against what they want. If they want aggressive, you don't have the right to go conservative.

MS. ADAMS: No, but could I provide a little nuance to that?

THE COURT: Yeah.

MS. ADAMS: What they have paid for is full discretionary investment management. What Financial Engines did not offer is investment management where you -- the participant gets to say I want you to manage my investments but not this and not this and not this. What they offered as a service was we will take this kind of information, and we will craft a portfolio that's appropriate for you under that.

So when Mr. Pizarro called and said he wanted to change his asset allocation, that's not something that is offered under the professional management program we're talking about here. If they wanted a service where Financial Engines offered advice and the participants could take or leave it, that's online access. That's another option. They could have chosen that instead, but, no, what they gave was discretionary authority. We had a duty to gather appropriate information, but, no, the discretion lies with Financial Engines and not --

THE COURT: Discretion lies consistent with what they've communicated is their general preferences; right? You would not have the discretionary authority to invest in penny stocks if someone says I want a conservative portfolio. You can go out and pick what conservative portfolio you want. You can go, you know, Home Depot stock, Coca-Cola stock, any blue chip stocks, but you're not going to be able to go get a start-up company that doesn't pay dividends and is growth-oriented in an industry that is very suspect.

I mean, I think we agree to that; right?

MS. ADAMS: Sure. That's a customization we offer, the aggressiveness preference, but it's not a pick and choose --

THE COURT: Right. So if they picked aggressive but then they want to become conservative because of some fears they have, you've got a fiduciary duty to do what they want when that is to go conservative in a general sense. You're not able -- maybe they can't direct you to buy certain stocks, but they certainly can direct the tone of the strategy that is used; right?

MS. ADAMS: That is the service that we offer, yes.

THE COURT: All right. I just think sometimes it's so hard -- I mean, you and I have been talking about this for 20 minutes, and we're going to get to the same spot. I'm not letting it go because I know the answer to the question, and I

think you do too. Sometimes you just have to admit, yeah, you know, they do have that right. I understand your argument that they didn't plead it well enough, but don't argue against something that's obvious, you know. I mean, that's obvious that they -- they're in charge of the general overall theme of their investment strategy. You're in charge of fulfilling that thing; right? You agree with that?

MS. ADAMS: Yes, we allow them to customize within those three categories and a wealth of other --

THE COURT: You allow them to change that too.

MS. ADAMS: Yes.

THE COURT: All right. Anything else you want to talk about?

MS. ADAMS: No, your Honor.

THE COURT: All right. Do you have anything else, Ms. -- I was fixing to say your last name -- I was going to mispronounce it so --

MS. AMERT: Amert.

THE COURT: Amert.

MS. AMERT: The A is just like in re.

THE COURT: A. Okay.

MS. AMERT: I will be brief because your Honor has been very patient today. I just wanted to offer a further thought on the conversation you were just having with Ms. Adams, and I think it's helpful to think of investment

advisory services' sort of level of service as falling across a range. So on one end you have a one-size-fits-all approach. Okay. And I would describe that as this: When I got my first job, my co-worker told me you've got a 401(k). You should put one-third in domestic equities, one-third in overseas equities, and a third in bonds. And that's a good investment allocation. That's the one-size-fits-all approach. It's free, and it actually works okay if you want to implement it that way.

At the other end of the spectrum you've got a bespoke approach; right? You hire an individual investment advisor who's trained to be very responsive, to look at your whole situation and, you know, how many kids you have, how much your mortgage is, what other investments you have, whether you own farmland, the whole spectrum, and give you individualized ongoing customized advice and take a lot of direction from you. That's a much more expensive service than the one we're talking about here today.

The one we're talking about here today is really in the middle. It's off the rack; right? So you go in, and you can choose from -- you have input into a variety of things. They don't all fit you. You pick your size. You, you know, ideally might want the sleeves shortened, but that's not a service that the store offers so you work with the advisor. You provide information.

And what having that mid level of service lets happen is basically the provision of group investment advice. People who have these characteristics generally should fall into -- you know, this is a generally good portfolio for them. It's not as customized as the, you know, bespoke individual model, but it's a lot more detailed than the one-size-fits-all everybody should allocate this way approach.

The question of whether there's a fiduciary duty in that middle model to tweak what you're doing in response to ongoing participant input is an interesting one, and although participant direction is really an important thing, I don't want to downplay it. Not being good at executing on that direction in every circumstance doesn't automatically become a breach of fiduciary duty.

THE COURT: Look. I'm with you on the discretionary functions that your clients have, but I do think the plaintiff raises a valid issue for us to at least talk about what happens when they can't communicate to your clients where they are because you can't make decisions based on -- and no matter whether -- I guess the one shoe fits all, we'll throw that one out the window because it really wouldn't matter what they communicated because they could always just change it, I guess, themselves by going online. I think with most companies you can make changes in whatever you want, unlike insurance.

But if you've got someone like the two defendants in this case that are actually picking the stocks that fit the profiles, what happens when they can't communicate where they are or changes that cause them to change where they want to be? Because that's what Mr. Tracey was arguing, is that his client wanted to change but couldn't change because he couldn't get through, and it was made impossible by the set up.

Now, I don't believe any of the defense agreed that was true, but taking it as true for here, my fundamental question is I think everybody would agree they should be able to change the risk level that they want. They may not be able to parse it into ten level risk levels. I want four. Maybe there's got to be a two or a five or an eight on a one to ten scale. But if they couldn't communicate it to you, then that raises the question of are there damages that they suffer. And he argues those damages are the money that they paid for the service of being able to make that change, and they couldn't make the change. That's the response I'm trying to figure out what y'all think about.

MS. AMERT: Right. So if they could demonstrate that they asked for a change that's in the possible range, right, so within the model and, you know, would have made a measurable difference and that there was some structural failure, right, something about the way the whole system is

set up that made it impossible for them to actually give input that could have been implemented and would have made a difference in their long-term results, at some point that might rise to a breach of fiduciary duty claim.

THE COURT: So your basic argument then is they're not automatically entitled to a refund, and any profits they would have made on the advice -- I mean on the fee for the advice, unless they can demonstrate that because they were not able to communicate they changed in risk preferences, that it would somehow cause them to suffer financially as to the fund -- as to the rest of money.

MS. AMERT: I think that's the minimum. I think they would also actually need to be able to plead not just that the customer service rep they called was having a bad day and was unresponsive but that there was a pattern and practice that prevented anyone from being able to make a change. And there are cases where there's a direction to a trustee that doesn't get executed on, and that can give rise to losses. But, again, the losses are, you know, the different -- are the money you should have made. They're not of fees that you paid. Their argument doesn't --

THE COURT: So breach of contract claim is what it is.

MS. AMERT: It's a breach of contract claim, and it's a, you know, complaint that should be raised to Home Depot

who, you know, picks the service provider. The plaintiffs aren't happy with the service provider, they should give that feedback to the people who have the opportunity to make a change. Employers are actually really interested in whether their plan participants like the services that they're getting. That's why they offer things like this.

But to the extent that what the plaintiffs are trying to do is fight with the model, you put people into categories, and you advise them accordingly. And the way you advise them is by managing their accounts. That's not a breach of fiduciary duty. It's also, you know, been approved by the SEC. It's been approved by the Department of Labor as a way of providing this middle category of investment advisory services.

If you put all of the fiduciary obligations of responsiveness that an individual advisor has on somebody trying to provide this middle level of services, you basically -- you do away with the middle level of services. You can only have the full bespoke option.

THE COURT: Okay. All right. Thank you.

MS. AMERT: Thank you.

THE COURT: Mr. Field, I wouldn't call on you for response because it was their motion, and y'all had your opportunity to argue.

So I'm not going to rule today on this either. I say

today. I mean right this minute. I may rule on it today. The likelihood is that I'm going to dismiss the claims against both the other two defendants. I think it is -- I think Mr. Tracey does argue a breach of contract claim and not a breach of fiduciary duty claim. So notwithstanding the questions I was asking Ms. Adams on that, that's where I'm likely going to be at the end of the day on it, but I do want to take some time to talk about it and think about it.

If I do lean in that direction, then I'll send an order to each of you to help me draft that order. Obviously I may make changes. Your argument is a little bit different as to some of the counts, so obviously I don't expect your orders to look exactly alike.

All right. So I've got another case here. I'm going to take a recess for about five minutes and come back and start on that.

COURTROOM SECURITY OFFICER: All rise. Court is in recess for about five minutes.

(Whereupon, the proceedings were adjourned at 12:30 p.m.)

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REPORTERS CERTIFICATE

I, Wynette C. Blathers, Official Court Reporter for the United States District Court for the Northern District of Georgia, with offices at Atlanta, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on March 14, 2019, in the matter of JAIME H. PIZARRO et al. v. THE HOME DEPOT, INC. et al., Case No. 1:18-CV-01566-WMR; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript (Pages 1 through 111) is a true and accurate record of the proceedings.

This the 14th day of March, 2019.

/s/ Wynette C. Blathers, RMR, CRR
Official Court Reporter